90-1212

No. _____

In The

Supreme Court of the United States

October Term, 1990

TAHOE-SIERRA PRESERVATION COUNCIL, INC., et al.,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

LAWRENCE L. HOFFMAN
Counsel of Record
JAMES K. BURAU
HOFFMAN, LIEN & FACCINTO
3000 N. Lake Boulevard
Post Office Box 7740
Tahoe City, California 95730
(916) 583-8542
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

This action involves a "*facial* takings challenge" brought by 364 individual owners of undeveloped, single-family homesites in the Lake Tahoe Basin. The Petitioners alleged in their Complaint that by the express provisions of the TRPA's 1984 Regional Plan, adopted over their vigorous protests, they were permanently prohibited from any development or economically viable use of their homesites, without compensation. The Court of Appeals, in a divided three-judge per curiam opinion,* held that Petitioners' *facial* challenge was not "ripe" for judicial review as the Petitioners had failed to first seek an amendment to the newly-adopted land use enactment before initiating this action. Thus, the questions presented for review are as follows:

(1) Whether the Court of Appeals' decision is in conflict with a long line of decisions of this Court, beginning with *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), which have repeatedly held that a *facial* challenge to a land use enactment is ripe for review when the regulation becomes effective;

(2) Whether the per curiam decision is materially at odds with the reported decisions of

---

* The holding of part III.A. of the per curiam opinion (App. A, 8a-16a) at issue appears to be the view of a single judge, the Hon. Stephen Reinhardt. Judge Betty B. Fletcher, in her special concurrence, stated she would not have reached the issue. App. A, 25a. Judge Alex Kozinski, in his partial dissent, took clear exception to the holding in part III.A. of the per curiam opinion. App. A, 28a-35a.

QUESTIONS PRESENTED – Continued

at least the First, Fourth and Eleventh Circuits which have each recently held that a *facial* challenge to a land use regulation is ripe for review on the effective date of the regulation;

(3) Whether the per curiam decision can be reconciled with other recent decisions of the Ninth Circuit which have held that a plaintiff mounting a *facial* challenge to a land use enactment need not further exhaust legislative or administrative remedies before seeking redress in the courts;

(4) Whether the Ninth Circuit itself has "gone too far" in fashioning a new "ripeness bar" for *facial challenges* to land use enactments, mistakenly applying principles applicabie to *as-applied challenges,* thereby depriving Petitioners of meaningful access to the courts; and

(5) Assuming the Ninth Circuit's new "ripeness bar" passes muster, whether Petitioners should nevertheless be afforded an opportunity to show factually that pursuit of an amendment to the Regional Plan would have been futile.

PARTIES TO THE PROCEEDING

The lead Petitioner is the Tahoe-Sierra Preservation Council, Inc., a California, non-profit, membership corporation. The other 364 individual Petitioners, each an affected property owner and member of the Petitioner Preservation Council, are listed in the caption to the Complaint. App. F, 117a-123a. Due to the length of that listing, reference is made here to the caption of the Complaint rather than setting forth the full names of those Petitioners. None of the corporate Petitioners is a subsidiary of a parent corporation.

The Respondents include the TAHOE REGIONAL PLANNING AGENCY ("TRPA"), a separate legal entity created pursuant to an interstate Compact between the States of California and Nevada; the then-voting members of the Governing Body of the TRPA, including TONY CLARK, CHESTER A. GIBBS, ALEXANDER HAAGEN, III, STAN HANSEN, THOMAS HSIEH, JAMES KING, ROBERT PRUETT, JAMES S. REED, LARRY SEVISON, THOMAS STEWART, WILLIAM D. SWACKHAMER, PEGGY TWEDT, ROLAND D. WESTERGARD, and NORMAN C. WOODS; the STATE OF NEVADA; and the STATE OF CALIFORNIA.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Introduction 3

B. Background and Proceedings Below 6

REASONS FOR GRANTING THE PETITION 12

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH, OR MISAPPLIES, WELL-ESTABLISHED PRECEDENTS OF THIS COURT APPLICABLE TO INITIATING LAND USE REGULATORY "FACIAL CHALLENGES" IN THE COURTS 12

II. THE NINTH CIRCUIT'S DECISION IS ALSO AT ODDS WITH RECENT DECISIONS OF AT LEAST THE FIRST, FOURTH, AND ELEVENTH CIRCUITS, AS WELL AS DECISIONS OF EVEN THE NINTH CIRCUIT, IN CREATING SUCH A NOVEL RIPENESS BAR TO FACIAL CHALLENGES 20

A. Conflict With Other Circuit Decisions ... 20

TABLE OF CONTENTS – Continued

Page

B. Conflict With Other Ninth Circuit Precedents 23

III. THE MERE FACT THAT A PROPERTY OWNER HAS THE "RIGHT" TO SEEK AN AMENDMENT TO OR REPEAL OF A LAND USE ENACTMENT SHOULD NOT RENDER ITS FACIAL CHALLENGE ANY LESS RIPE FOR JUDICIAL REVIEW 24

CONCLUSION 30

APPENDICES

APPENDIX A – Opinion of Court of Appeals 1a

APPENDIX B – District Court Order, May 10, 1985 ..... 36a

APPENDIX C – District Court Order, June 6, 1986 ..... 53a

APPENDIX D – Court of Appeals' Order Denying Rehearing, October 31, 1990 ..... 71a

APPENDIX E – Tahoe Regional Planning Compact – P.L. 96-551 ..... 73a

APPENDIX F – Complaint for Inverse Condemnation 117a

TABLE OF AUTHORITIES

Page

CASES:

Agins v. Tiburon, 447 U.S. 255 (1980) 13, 16, 21

Beacon Hill Farm Associates v. Louden County Board of Supervisors, 875 F.2d 1081 (4th Cir. 1988) 20-21

California v. Tahoe Regional Planning Agency, No. Civs-84-0516-EJG (E.D. Cal. 1984) 7

California v. Tahoe Regional Planning Agency, 766 F.2d 1308 (9th Cir. 1985) 7

Crow-New Jersey 32 Ltd. v. Township of Clinton, 718 F.Supp. 378 (D. N.J. 1989) 22

Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990) 22

First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987) 4, 11, 14, 16, 17, 18, 19

Fry v. City of Hayward, 701 F.Supp. 179 (N.D. Cal. 1988) 22

Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) 15

Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1977) 23

Herrington v. County of Sonoma, 834 F.2d 1488, *amended* 857 F.2d 567 (9th Cir. 1988) 23, 24

Hodel v. Irving, 481 U.S. 704 (1987) 14

Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981) 15

TABLE OF AUTHORITIES – Continued

Page

Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1977) 8, 10, 12

Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) 14

Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984) 18

Lake Nacimiento Ranch Co. v. County of San Luis Obisbo, 830 F.2d 977 (9th Cir. 1987) *amended* 841 F.2d 872 (1988) 23

League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 507 F.2d 517 (9th Cir. 1974) 8

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 449 (1982) 15

Martino v. Santa Clara Valley Water District, 703 F.2d 1141 (9th Cir. 1983) 23

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 16, 17

San Diego Gas and Electric v. City of San Diego, 450 U.S. 621 (1981) 19, 28-29

Smithfield Concerned Citizens v. Town of Smithfield, 907 F.2d 239 (1st Cir. 1990) 20

Southern Pacific Transportation Co. v. City of Los Angeles, 1990 WL 205207 (9th Cir. Sept. 7, 1990), *amended and refiled* Dec. 4, 1990, ___ F.2d ___ 24

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 9th Cir. No. 87-2096 3

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 911 F.2d 1331 (1990) ..1, 2, 10, 23-27

TABLE OF AUTHORITIES – Continued

Page

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 12-13, 21

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) 16, 17, 20

Zilber v. Town of Moraga, 692 F.Supp. 1195 (N.D. Cal. 1988) 16, 22

STATUTES AND COMPACTS:

28 U.S.C. § 1254(1) (1990) 2

Tahoe Regional Planning Compact, Pub. L. No. 96-551, 94 Stat. 3233 (1980) 2

Article V(a)(2) 24-25

Article V(b) 6-7

Article V(c) 7

Article VI(j) 8

Article VI(j)(2)(A) 3

Article VI(j)(4) 8, 25

California Government Code §§ 65900-65963.1 28

California Government Code § 65950 28

California Government Code §§ 66800-66801 2

California Public Resources Code §§ 21100.2 and 21151.5 28

Nevada Revised Statutes §§ 277.190-.200 2

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

Berger, *'Ripeness' Test for Land Use Cases Needs Reform: Reconciling Leading Ninth Circuit Decisions Is An Exercise in Futility*, 11 Zoning and Planning Law Report 57 (September 1988) 5

Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 Urban Lawyer 735 (Summer 1988) 5

Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 Hofstra Prop. Law Journal 73 (1988) 6

Kratovil, *Land Use Takings and the Problem of Ripeness in the United States Supreme Court Cases*, 1 B.Y.U. Journ. of Pub. L. 375 (1987) 6

Mandeleker and Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Regulation*, Zoning and Planning Law Report, Vol. 11, No. 7, 49 (1988) 6

No. _____

In The

Supreme Court of the United States

October Term, 1990

TAHOE-SIERRA PRESERVATION COUNCIL, INC., et al.,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

The Tahoe-Sierra Preservation Council, Inc., a California non-profit corporation and membership organization, and the 364 named plaintiffs (individual property owners) in this action, hereafter the Petitioners, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals, filed on August 9, 1990 and amended on August 27, 1990, is reported at 911 F.2d 1331. App. A, 1a-35a. The unreported

order of the district court entered on May 10, 1985 dismissing certain claims is found at App. B, 36a-52a. The unreported order of the district court entered on June 6, 1986 granting summary judgment as to the remaining claims is found at App. C, 53a-70a.

JURISDICTION

The matter having been argued on June 10, 1987, the decision of the Court of Appeals was filed on August 9, 1990, and thereafter amended by that court on its own motion on August 27, 1990 (App. A, 1a). A timely petition for rehearing and/or suggestion for rehearing en banc was denied on October 31, 1990. App. D, 71a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The TRPA is a separate legal entity created pursuant to the Tahoe Regional Planning Compact entered into between the states of California and Nevada, as extensively amended effective on December 19, 1980 (hereafter "the Compact"). Pub.L. 96-551, 94 Stat. 3233; Cal. Gov't Code §§ 66800-66801; Nev.Rev.Stat. §§ 277.190-.200. A complete copy of the Compact is found at App. E, 73a-116a. The specific provisions of TRPA's 1984 Regional Plan at issue in this case, adopted by its ordinance effective on April 26, 1984, are set forth verbatim in the COMPLAINT FOR INVERSE CONDEMNATION, DENIAL OF CONSTITUTIONAL AND CIVIL RIGHTS, DAMAGES, AND DECLARATORY AND INJUNCTIVE RELIEF. App. F, 154a-156a and 160a-163a; also see footnotes 7 and 8, *infra*. The applicable provisions of TRPA's interim Ordinance No. 81-5, also at issue in this litigation, are described in detail in the Complaint. App. F, 149a-150a.

STATEMENT OF THE CASE

A. Introduction

This case is about 364 individuals who purchased one or more single-family lots located in established residential subdivisions on the Nevada side of the Lake Tahoe Basin, with the expectation of one day building thereon their retirement or vacation homes. In large measure, the lots are 1/4 to 1/3 acre in size, are zoned only for single-family residences, are in neighborhoods in which many homes already have been built, and are served by paved roads, sewers, water service, and other utilities.

Following a lengthy and often contentious land use process initiated and pursued by TRPA, the TRPA's Governing Board, over the vehement protests of the Petitioners (and hundreds of other affected property owners), adopted the 1984 Regional Plan at issue. When their protests had proved of no avail and the Regional Plan was adopted, the property owners banded together, and with their representative membership organization brought this suit in the federal district court.[1] The Petitioners alleged in their Complaint that the Regional Plan, *by its express terms*, directly prohibits them from building

---

[1] Article VI(j)(2)(A) of the Compact provides: "Venue lies . . . in the state or federal judicial district where the real property is situated." App. E, 104a. Thus, the Nevada-side property owners filed this action in the Federal District Court for the District of Nevada. The Petitioner Preservation Council, along with 415 other property owners owning similar undeveloped single-family homesites on the California side of the Lake Tahoe Basin, also simultaneously filed a nearly identical action in the Federal District Court for the Eastern District of California in Sacramento. A decision in that case is currently pending in the Ninth Circuit, having been allowed to "trail" the Nevada-side case at issue herein. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 9th Cir. No. 87-2096. The legal issues involved are virtually identical.

their homes on, or making any other economically viable use of, their properties. Specifically, they alleged that the express terms of the Regional Plan, combined with a similar predecessor "interim moratorium," constituted a "taking" of their property, without any compensation, in contravention of the Fifth Amendment. The central issue in this lawsuit, of course, is who should pay for the burden of correcting perceived environmental abuses caused by prior urbanization of portions of the Lake Tahoe Basin – the property owners whose lands have not yet been built upon, or the public at large through the responsible government agencies?

After six years of costly and protracted litigation, the Court of Appeals, for the first time in any reported decision, found Petitioners' facial challenge not "ripe" for judicial review because they had not first asked TRPA to change its mind – or in the new parlance of the "takings game," their facial challenge was not "ripe" for judicial review because they had failed to first apply for and pursue an amendment to the Regional Plan which had been adopted over their vigorous protestations.

In *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), a case involving a similar *facial* challenge to a newly-adopted land use regulation, this Court set to rest the troublesome question of the remedy available to an aggrieved property owner when government, by its land use regulations, "goes too far" so as to "take" private property for public use. In *First English*, this Court held that "just compensation" was mandated by the Constitution for the period of time the regulation remained in effect. Unfortunately, however, that did not set the matter to rest.

Rather, since *First English*, the troublesome issue of *ripeness* has assumed center stage – with most takings litigation now seeming to focus almost exclusively on the procedural issue of when, if ever, the property owner is entitled to his or her day in court, not the substantive

legal issues involved. As one perceptive commentator recently noted:

> "Since the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), land use litigation has taken on the distinct aroma of a produce market: rather than examining governmental actions and their effects on property owners, courts have become possessed by problems of determining whether a particular case is 'ripe' enough even to consider. (It may even be possible that, if the courts would stop spending so much time squeezing the fruit and more time dealing with the merits, less of their time would be consumed and more justice could be done.)" Berger, *'Ripeness' Test for Land Use Cases Needs Reform: Reconciling Leading Ninth Circuit Decisions Is An Exercise in Futility*, 11 Zoning and Planning Law Report 57 at 57 (September 1988).

As that same commentator noted in a separate scholarly assessment of recent takings jurisprudence:

> "The 'ripeness' rules have turned land-use planning into a perverse game. Their fuzzy nature and inadvertent interplay have created a situation in which no one can be sure what the rules actually are. A perceptive participant in the drafting of judicial opinions once opined that it is hard to quarrel with the objective that an opinion contain a reasonably articulated explanation of why the losing party lost. Reading 'ripeness' decisions these days is enough to make one's head spin. Something is very wrong and in need of corrective attention." Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 Urban Lawyer 735, 795 (Summer 1988).[2]

---

[2] Other commentators have also recently expressed similar concerns over the judicial trend limiting access to the courts in regulatory takings cases based on "ripeness" concerns. See,

(Continued on following page)

The per curiam opinion provides possibly the most graphic example of how the rules of the "takings game" have recently become disturbingly convoluted and confused, and how important it is for this Court to provide critically-needed judicial guidance. Surely there can be no more vivid example than the instant case of the patent unfairness of the existing process – of how easy it now is when relief is apparently in sight simply to move the goal posts back at the last moment, so as effectively to defeat the very protections afforded to private property owners by the Fifth Amendment.

B. Background and Proceedings Below

Following comprehensive amendments to the bi-state Compact, which became effective on December 19, 1980, the TRPA began the process of preparing a new Regional Plan for the Lake Tahoe Basin to address perceived environmental problems.[3] App. E, 88a-91a. First, in June of

---

(Continued from previous page)

e.g., Mandeleker and Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Regulation*, Zoning and Planning Law Report, Vol. 11, No. 7, at 49-56 (1988); and Kratovil, *Land Use Takings and the Problem of Ripeness in the United States Supreme Court Cases*, 1 B.Y.U. Journ. of Pub. L. 375, 392 (1987). For a particularly illuminating discussion of the confused treatment given the ripeness issue by the various circuits, see Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 Hofstra Prop. Law Journal 73-163 (1988). Summarizing the situation in the Ninth Circuit, for instance, the author noted: "The Court of Appeals for the Ninth Circuit has had many opportunities to refine the finality requirement of the ripeness doctrine. However, its decisions have not yet yielded any predictable approach for plaintiff property attorneys." *Id.* at 108.

[3] Article V(b) of the Compact required the TRPA to adopt "environmental threshold carrying capacities for the region" within 18 months of December 19, 1980, the effective date of

(Continued on following page)

1981, in order to "freeze the landscape" while it was undertaking the new land use planning process, the TRPA adopted an "interim ordinance" (Ordinance 81-5 effective on June 25, 1981), which remained in effect until the new Regional Plan was completed. Petitioners alleged that interim Ordinance 81-5, by its express provisions, effectively prohibited each of them from building on their residential parcels for nearly three years while TRPA was preparing its new Regional Plan. App. F, 149a-151a.

After three more years of extensive planning efforts, including several public hearings at which the Petitioners vehemently expressed their opposition to the proposed draft Plan, the TRPA Governing Board nevertheless acted to adopt the 1984 Regional Plan at issue.[4] In doing so,

---

(Continued from previous page)

the Compact amendments. Article V(c) required TRPA to then amend its Regional Plan and land use ordinances within one year thereafter to incorporate those environmental threshold carrying capacities. In fact, this task was not completed by TRPA until April, 1984, or a total of approximately 40 months after it began. App. E, 88a-91a.

[4] On April 26, 1984, the same day that TRPA's 1984 Regional Plan became effective, the California Attorney General and an orgainzation known as the League to Save Lake Tahoe, brought a separate suit against TRPA for declaratory and injunctive relief, arguing that the newly-enacted Regional Plan did not go far enough in terms of environmental protection. *California v. Tahoe Regional Planning Agency*, No. Civs-84-0516-EJG (E.D. Cal. 1984). On August 29, 1984, the district court in Sacramento granted California's request for a preliminary injunction, and issued an order which "enjoined and restrained [TRPA] from taking any action to approve any project . . . or to approve the construction of any man-made development within the agency's jurisdiction," with certain limited exceptions. That preliminary injunction was affirmed on appeal. *California v. Tahoe Regional Planning Agency*, 766 F.2d 1308 (9th Cir. 1985). Nevertheless, a number of projects were

(Continued on following page)

TRPA provided neither a mechanism for "variances," nor for its purchase of the affected properties. In fact, TRPA had no budget for land acquisition, and considered itself immune from inverse condemnation claims by virtue of the Ninth Circuit's earlier decision in *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1977), which had held that TRPA could not be sued in *inverse* condemnation because it lacked *direct* condemnation powers under the Compact.[5]

Following the adoption of the 1984 Regional Plan, and keeping in mind the 60-day statute of limitations set forth in Art. VI(j)(4) of the Compact (App. E, 105a),[6] the Petitioners timely filed their Complaint on June 25, 1985 in the Federal District Court for the District of Nevada. App. F, 117a-194a. The district court had subject matter jurisdiction pursuant to Article VI(j) of the Compact (App. E, 103a-105a); see also, *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 507 F.2d 517 (9th Cir. 1974).

(Continued from previous page)

allowed to proceed during the course of that preliminary injunction by way of judicially-approved, case-by-case exceptions to the injunction.

[5] The 1984 Regional Plan at issue remained in full force and effect until it was replaced on July 15, 1987 by still another regional plan – known as the 1987 Regional Plan. Even today, under the 1987 Regional Plan and its implementing ordinances, TRPA continues to impose a total prohibition against building on parcels identified as being in Stream Environment Zone ("SEZ") areas (applicable to many of the Petitioners' properties), although a new system for land classification was placed into effect for the former Class 1, 2, and 3 properties. To date, the provisions of the 1987 Regional Plan are not at issue in this litigation.

[6] Art. VI(j)(4) states in pertinent part: "A legal action arising out of the adoption or amendment of the regional plan . . . shall be commenced within 60 days after final action by the agency." App. E, 105a.

As set forth in greater detail in the Complaint, the Petitioners comprise two separate groups: first, those who own parcels in areas classified by TRPA as "stream environment zones" (the "SEZ plaintiffs"); and secondly, those whose properties are in areas classified by TRPA as Land Capability Classes 1, 2, and/or 3 (the "Class 1, 2, and 3 plaintiffs"). The specific proscriptions of the Plan which the SEZ plaintiffs alleged *on their face* prohibited any economically viable use of their single-family lots are set forth verbatim in paragraph 26 of the Complaint. App. F, 154a-156a.[7] Similarly, the express prohibitions on development applicable to the properties owned by the Class 1, 2, and 3 plaintiffs are set forth verbatim in Paragraph 30 of the Complaint (App. F, 159a-164a), followed by additional "takings allegations" in Paragraphs 31-33 (App. F, 164a-167a) and the Fifth Claim for Relief (App. F, 182a-185a).[8]

---

[7] As to the SEZ properties, the Regional Plan provided in pertinent part: " . . . *only forest management practices, stream improvement programs, and habitat restoration projects are permissible uses*"; and " . . . *no new development shall be permitted in stream environment zones* . . . " App. F, 155a. In Paragraph 28 of the Complaint, it was alleged that the Plan's prohibitions applicable to SEZ lands, when "combined with similar prohibitions and restrictions set forth in Ordinance 81-5," have "deprived [the SEZ plaintiffs] of the entire practical, substantial, viable, beneficial, reasonable, economic and feasible use of their properties, there being no other lawful or authorized practical or reasonable use to which their properties can be put." App. F, 157a. Also see the similar allegations of the Second Claim for Relief. App. F, 172a-175a.

[8] As to the Class 1, 2, and 3 properties, the Regional Plan provided in pertinent part: "*Development of environmentally sensitive lands in capability classes 1, 2, and 3 will not be permitted*" [App. F, 160a], or as stated elsewhere, "*there shall be a prohibition of development on Land Capability Class 1-3 land* . . . " This prohibition was subject to an "exception" that, to date, has never been implemented – a theoretical exception that would

(Continued on following page)

As of the filing of the Complaint, the 364 individual property owners owned (many as husband and wife) in the aggregate some 287 separate parcels of land at issue in this litigation, of which 65 parcels are so-called SEZ parcels and 172 are Class 1, 2, and 3 parcels.[9]

The Complaint included seven separate claims for relief. See summary set forth by the Court of Appeals at 911 F.2d 1331, 1334 (App. A, 2a-4a). After two years of costly litigation, the district court dismissed the inverse condemnation and related claims for monetary relief (the Second, Fifth, Sixth and Seventh Claims) as to the two states on sovereign immunity grounds, and as to TRPA on the basis of *Jacobson, supra* – suits for *inverse* condemnation do not lie against TRPA as it does not have statutory powers to *directly* condemn property. App. B, 36a-52a. Subsequently, the district court granted defendants' motions for summary judgment on the remaining

---

(Continued from previous page)

have allowed up to 75 lots per year for three years (9%), out of the estimated 2350 Class 1, 2, and 3 lots on the Nevada side, to be developed based on "a point priority system." The Complaint alleged this exception " . . . offers such a statistically insignificant and *de minimus* chance that the named Plaintiffs might qualify to use or build upon their property that it cannot be considered a viable or meaningful exception or variance to such prohibitions. Clearly, such an exception gives only the bare appearance of fairness, while in fact the Regional Plan totally and permanently precludes any construction on or reasonable use of approximately 91% (not more than 225 out of approximately 2350 are potentially eligible for approval to build) of the remaining Class 1, 2, and 3 lawfully-created lots or parcels in the State of Nevada . . . " App. F, 165a.

[9] Attached to the Complaint was an individual appendix for each parcel invoived, setting forth the relevant information regarding that parcel, along with a map showing that the parcel was located in an area earmarked by the Regional Plan as either an SEZ area or Class 1, 2, or 3 area. Two examples of such appendices are found immediately behind the Complaint, App. F, 195a-199a.

claims (the First, Third, and Fourth Claims for Relief). App. C, 53a-70a.

The Petitioners then appealed to the Court of Appeals where the matter was briefed and set for oral argument. Somewhat fortuitously, on June 9, 1987, the day before oral argument, this Court issued its decision in *First English*, providing needed guidance as to the appropriate remedy should the Petitioners prevail. Shortly after oral argument, the Court of Appeals, on its own motion, issued an order removing the case from submission and directed the parties to explore settlement. After a lengthy period in which settlement discussions proved fruitless, the matter was resubmitted.

Finally, after a further inexplicable delay, the per curiam decision was rendered on August 9, 1990 – nine years after TRPA first imposed its initial interim moratorium in 1981, six years after the Regional Plan was adopted and litigation commenced, and over three years after the matter was briefed and argued to the Court of Appeals. Borrowing from the "ripeness criteria" applied by this Court to *as-applied challenges*, the Court of Appeals found, to the Petitioners' dismay, that because the property owners had not first sought an "amendment" to the newly-adopted plan – which the per curiam opinion found was analogous to seeking a "variance" to a zoning requirement – their *facial* challenge was not ripe for judicial review. To the best of Petitioners' knowledge, this is the first time any appellate court has so held. Petitioners' request for rehearing and/or suggestion for rehearing en banc was thereafter denied on October 31, 1990. App. D, 71a-72a.

Thus, without the intervention of this Court, the rules of the "takings game" have once again been massaged to raise the ripeness bar still another major notch, so as effectively to deny these property owners, who have done everything possible to protect their constitutional rights, an effective avenue to pursue the protection of those rights in the courts. In short, they have been told late in the game, and after long and costly litigation, that

they must start over again through still another costly and protracted regulatory process, and failing that, presumably through still another judicial battle to try and redress the injury that already has been inflicted.[10]

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH, OR MISAPPLIES, WELL-ESTABLISHED PRECEDENTS OF THIS COURT APPLICABLE TO INITIATING LAND USE REGULATORY "FACIAL CHALLENGES" IN THE COURTS

In an unbroken line of cases extending nearly seven decades, this Court has often considered and reviewed *facial* challenges to legislative land use enactments where it was contended that those enactments, "on their face," created a "taking" of private property or a denial of due process in violation of the Fifth and/or Fourteenth Amendments. Frequently reaching the merits of the substantive issues involved, this Court never once articulated a principle that judicial review of those *facial* challenges was barred by the failure of the plaintiffs to show that they had first sought a corrective amendment (or repeal) from the legislative body to the enactment which was being challenged.

In the seminal land use decision of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), this Court reviewed

---

[10] The Petitioners concur with much of the per curiam opinion, particularly as it addresses the issues of "mootness" and TRPA's claimed immunity under *Jacobson*. However, by way of this Petition, the Petitioners take vigorous exception with the Court of Appeals' determination in part III.A. of the per curiam opinion (App. A, 8a-16a) that the Petitioners' facial challenge was not ripe for review due to their failure to first seek an amendment to the Plan.

a constitutional challenge to a zoning ordinance adopted by the Village Council establishing a comprehensive zoning plan which regulated the uses of all lands within the village. The Village argued in the lower court that, because the property owner had made no effort to obtain a building permit or apply to the zoning board of appeals for relief as it might have done under the terms of the new ordinance, the suit was premature. In response, this Court held:

> "The motion was properly overruled. The effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses, and the attack is directed, not as against any specific provision or provisions, but against the ordinance in its entirety. Assuming the premises, the existence and maintenance of the ordinance in effect constitutes a present invasion of appellee's property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear." 272 U.S. at 386-87.

More recently, in a series of land use cases involving "facial challenges," this Court has not hesitated to tackle the substantive issues presented by those cases, without first requiring the property owners to start over by seeking an amendment to the complained-of provisions. For example, in *Agins v. Tiburon*, 447 U.S. 255 (1980), this Court reviewed the decision of the California Supreme Court which had found the zoning ordinance at issue (downzoning the plaintiff's property to Residential Planned Development, allowing between one and five residences to be built on plaintiff's 5-acre tract) had not deprived the plaintiffs of their property in violation of the Fifth Amendment. Turning to the merits of the case, this Court agreed with the California Supreme Court, finding:

> "We now affirm the holding that the zoning ordinance *on its face* does not take the appellant's property without just compensation." 447 U.S. 255, 259 (emphasis added).

Again, in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), this Court found no difficulty in addressing the merits of the property owners' *facial* challenge to certain specific provisions of Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act, finding that under the circumstances the plaintiffs had not shown that *on its face* it effected a taking of their property. In doing so, this Court again noted the important distinction between a *facial* challenge and an *as-applied* challenge, stating:

> "The posture of the case is critical because we have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation." 480 U.S. at 494.

After noting that, "Petitioners thus face an uphill battle in making a facial attack on the Act as a taking" (480 U.S. at 495), and after examining the language of the Act and the facts involved, this Court concluded that petitioner's *facial* attack had not been proven. 480 U.S. at 501-02.

Similarly, in *Hodel v. Irving*, 481 U.S. 704 (1987), this Court held in a *facial* challenge case that the "escheat provision" of the Indian Land Consolidation Act of 1983 effected a taking of appellees' property without just compensation, again without requiring that the appellees first had to seek an amendment to that enactment. And, of course, that same term in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), this Court did not feel the least bit constrained from addressing the substantive issues involved in a similar *facial* challenge, merely because the plaintiffs had not

first sought an amendment to or repeal of the emergency ordinance at issue.[11]

Disregarding this consistent line of precedents involving *facial* challenges, and instead erroneously borrowing from holdings by this Court in two recent *as-applied* takings cases, the per curiam opinion created an entirely new, nearly insurmountable "ripeness barrier" to *facial* challenges. According to the per curiam opinion, an aggrieved property owner is now precluded from seeking redress in the courts until he or she has first sought a corrective amendment to (or repeal of) the statute or regulatory enactment. In effect, the per curiam opinion concluded that even where the legislative enactment was adopted by the regulatory body over the property owner's protests, nevertheless upon enactment the burden is then shifted to the property owner to undo the damage, by first pursuing a costly and likely futile effort to seek an amendment (or repeal) of the very same enactment before pursuing judicial redress.

In doing so, the per curiam opinion fails to recognize the important distinction between the proper ripeness

---

[11] Also see, among others, *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), upholding as constitutional the town's ordinance regulating dredging and pit excavating against a *facial* challenge, finding no taking had occurred, without requiring that the property owner first apply for an amendment; *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981), a *facial* challenge to the Surface Mining Control and Reclamation Act, where this Court addressed the merits of the claim and found the Act constitutional against a Fifth Amendment takings claim without requiring the property owner first to apply for an amendment; and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 449 (1982), where the Court found a provision of New York law permitting installation of a cable T.V. facility on private property without compensation was a taking under the Fifth and Fourteenth Amendments, again without requiring the property owner first to seek an amendment to the law.

standards applicable to *facial*, as contrasted with *as-applied*, constitutional attacks in land use cases: if a statute is unconstitutional *on its face*, the constitutional injury is complete when the statute becomes effective and judicial redress may then be sought (*First English, supra*, at 320-21); but if the challenge goes to the *manner* in which a statute is *applied* to the property owner's own request for land use entitlements, not to the express terms of the statute, then the court must wait to see how the statute is "finally applied" by the public agency to the property owner's application before it can determine the constitutional issues.[12] *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); and *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986).

In *Williamson County*, for instance, the plaintiff-developers applied for entitlements from the county to build a residential subdivision. When their application was denied, they challenged the county's refusal to approve their revised preliminary development plat, not the underlying land use enactment. The plaintiffs' claims in

---

[12] An excellent treatment of the distinction between *facial* and *as-applied* takings challenges is provided by the district court in *Zilber v. Town of Moraga*, 692 F.Supp. 1195 (N.D. Cal. 1988), where the court noted, at pp. 1200-01:

> "This distinction between facial and as-applied challenges for purposes of final decision ripeness flows naturally from the differing nature of the two types of claims. Since the issue in a facial challenge is whether 'mere enactment of the zoning ordinances constitutes a taking,' *Agins*, 447 U.S. at 260, 100 S.Ct. at 2141, there is no need for a final decision by the enforcing authority as to how the law will be applied in a particular case. Put differently, a court need not know how a statute will be administered to determine whether it constitutes a taking on its face. Therefore final decision ripeness is not a bar to Zilber's taking claim."

Williamson County differed fundamentally from the claims of the Petitioners in this case. In *Williamson County*, the plaintiffs complained only of the *effect* of the zoning ordinance *as applied* to them – not that the *express terms* of the ordinance created the impermissible taking. By contrast, the Petitioners here have not sought a development permit from TRPA. Rather, TRPA itself initiated the new land use regulations, over the Petitioners' repeated protests, which regulations the Petitioners alleged, *on their face*, specifically prohibited the further economically viable use of their single-family homesites.

Similarly, in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), also relied upon in the per curiam opinion, the property owner had initiated the land use process by seeking an application for a tentative map to develop its property. Its judicial challenge went to the rejection of that tentative map by the county planning commission and board of supervisors, not to the underlying statutory enactment. *Id.* at 342. According to the *MacDonald* Court, "an essential prerequisite to [the assertion of an *as-applied* regulatory takings claim] is a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *Id.* at 348. This Court then noted that the property owner had submitted only one application for a subdivision approval, and had received only one response to that application. Citing *Williamson County*, the Court found that was not adequate "exhaustion" before lodging an *as-applied* challenge. *Id.* at 349.

In contrast to *Williamson County* and *MacDonald*, this Court most recently addressed a *facial challenge* to a land use enactment in *First English*. There, this Court had no trouble dealing with the substantive issues involved, and never once suggested that the property owner first had to seek an amendment to the complained-of emergency ordinance before its claim was "ripe" for judicial relief. In fact, after referring to *MacDonald* and *Williamson County*, this Court characterized the factual situation in *First English* as entirely different, stating:

> "The posture of the present case is quite different. Appellants' complaint alleged that 'Ordinance No. 11,855 denies [it] all use of Lutherglen,' and sought damages for this deprivation." 482 U.S. at 311.

The Court made it clear that in a *facial* challenge context, the injury is complete on the date of enactment of the offending statute:

> "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' [Citations omitted] In the present case the interim ordinance was adopted by the County of Los Angeles in January 1979, and became effective immediately. Appellant filed suit within a month after the effective date of the ordinance and yet when the Supreme Court of California denied a hearing in the case on October 17, 1985, the merits of appellant's claim had yet to be determined. The United States has been required to pay compensation for leasehold interests of shorter duration than this. * * * Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period." 482 U.S. at 318-19.[13]

---

[13] In *First English*, this Court further distinguished *Williamson County*, citing with approval *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 (1984) – "Where Government physically occupies land without condemnation proceedings, 'the owner has a right to bring an inverse condemnation suit to recover the value of the land *on the date of the intrusion of the government.*' " 482 U.S. 304, 320-21 fn. 10 (emphasis in original).

The Court then held:

> "We merely hold that where government's activities have already worked a taking of all use of property, *no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.*" 482 U.S. at 321. (Emphasis added).[14]

In brief, it is submitted that this Court has made it patently clear that in cases such as the instant one involving *facial* challenges to the express terms of a land use enactment, those claims are "ripe" for judicial review as soon as the enactment becomes effective – the point when the constitutional injury occurs. Nowhere has this Court ever suggested that the rules applicable to *as-applied* challenges – such as the requirement that the property owner first seek a "variance" to a zoning ordinance where available – should be applied to such *facial* challenges. Where, as here, the property owner claims that the statute or land use enactment adopted by a public agency, on its face and by its express terms, "takes" all economically viable use of his or her property, then "the landowner has

---

[14] The dissent of Justice Brennan in *San Diego Gas and Electric v. City of San Diego*, 450 U.S. 621 (1981), relied upon by the majority in *First English*, is also insightful. As Justice Brennan stated:

> "The language of the Fifth Amendment prohibits the 'tak[ing]' of private property for 'public use' without payment of 'just compensation.' As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation, and 'the self-executing character of the constitutional provision with respect to compensation,' *United States v. Clarke*, 445 U.S. 253, 257 (1980), quoting 6 J. Sackman, Nichols' Law of Eminent Domain at 25.41 (rev. 3d ed. 1980), is triggered." 450 U.S. at 654. (emphasis in original).

already suffered a constitutional violation, and the self-executing character of the Fifth Amendment . . . is triggered." 450 U.S. at 654 (emphasis in original).

II. THE NINTH CIRCUIT'S DECISION IS ALSO AT ODDS WITH RECENT DECISIONS OF AT LEAST THE FIRST, FOURTH, AND ELEVENTH CIRCUITS, AS WELL AS DECISIONS OF EVEN THE NINTH CIRCUIT, IN CREATING SUCH A NOVEL RIPENESS BAR TO FACIAL CHALLENGES

A. Conflict With Other Circuit Decisions

The per curiam opinion squarely conflicts with recent decisions from several other circuits holding that *facial* challenges to land use regulatory enactments are not barred by the ripeness criteria applicable to *as-applied* challenges. For example, the First Circuit, in *Smithfield Concerned Citizens v. Town of Smithfield*, 907 F.2d 239 (1st Cir. 1990), recently addressed a challenge brought by twenty-five property owners, who alleged that the town's newly-adopted zoning ordinance had cost them $50-million in damages, and who also sought an injunction declaring the new zoning ordinance invalid. The district court had relied on *Williamson County* in support of its ruling that the plaintiffs' substantive due process claims were not ripe until the plaintiffs had first sought "final decisions" from the town's zoning board. The First Circuit, in reversing, noted at 907 F.2d 242-43:

> "The district court erred in ruling that a facial substantive due process challenge to a zoning ordinance under the above theory is not ripe for adjudication until variances have been applied for (and inverse condemnation proceedings invoked)." [Citing *Euclid v. Ambler Realty Co., supra, Pennell v. City of San Jose*, 485 U.S. 1 (1988), and other recent decisions.]

Similarly, in *Beacon Hill Farm Associates v. Louden County Board of Supervisors*, 875 F.2d 1081 (4th Cir. 1988), the property owners brought a *facial* challenge to the newly-adopted revisions to the Louden County General

Zoning Ordinance, which ordinance was intended to regulate development on the environmentally-sensitive mountainsides of the County. The district court had dismissed the constitutional challenge as not ripe for review because the landowner had not yet sought a development permit, nor shown how the ordinance would be applied to its property. The Fourth Circuit, in reversing the district court's dismissal, and after tracing the decisions of this Court since *Euclid v. Ambler Realty Co., supra,* concluded that the district court should have addressed the plaintiff's *facial* challenge on the merits, holding:

> "Beacon Hill's complaint alleges that the mountainside development overlay district ordinance violates the due process clause of the Fourteenth Amendment in that it is 'unreasonable, arbitrary, and capricious and bears no substantial relationship to the advancement of a legitimate state interest' and that it violates the equal protection clause of the Fourteenth Amendment in that the ordinance classifies property based on elevation and slope and that such classifications are 'arbitrary, discriminatory, unreasonable and bear no reasonable or substantial relation to a legitimate governmental interest.' While the complaint is couched almost completely in conclusory terms, about which no present objection is made, in so far as it presents a facial attack on the ordinance, it should not have been dismissed as being premature. See *e.g. Agins, supra; Pennell, supra.* In view of the fact that a facial challenge to a land use ordinance must carry such a heavy burden of persuasion that it may even seem that the claim of facial invalidity is entirely without merit [footnote omitted], the question should nevertheless be decided for the claim is not premature merely because it is brought before a final determination of the extent of the ordinance's application to a specific piece of property after application for the proper permits has been made." 875 F.2d at 1084-85.

In addition, in *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990), the Eleventh Circuit, after a lengthy discussion of the distinctions between different types of constitutional challenges to land use enactments, went on to note the important differences in the ripeness criteria applicable to *facial*, versus *as-applied* challenges:

> "It is important first to note that Eide's challenge is an as-applied challenge, not a facial challenge. In order to challenge the County's *application* of the sector plan to his property, Eide must first demonstrate that the sector plan has been *applied* to his property." 908 F.2d at 724-25 (emphasis in original).

In a companion footnote, the Eleventh Circuit stated:

> "This requirement does not apply to a facial challenge. *Fry v. City of Hayward*, 701 F.Supp. 179, 181 (N.D. Cal. 1988). There is an important reason for this distinction: when a landowner makes a facial challenge, he or she argues that *any* application of the regulation is unconstitutional; for an as-applied challenge, the landowner is only attacking the decision that applied the regulation to his or her property, not the regulation in general." 908 F.2d at 724, fn. 14.[15]

---

[15] Also see, for example, the following recent district court decisions: *Fry v. City of Hayward*, 701 F.Supp. 179, 181 (N.D. Cal. 1988) – the property owner's *facial* challenge to the open space referendum was ripe for review, "since a 'final decision' on the application of the statute is not a prerequisite to a facial challenge"; *Zilber v. Town of Moraga*, 692 F.Supp. 1195 (N.D. Cal. 1988) – while the property owner's *as-applied* challenge, absent a final rejection of its application, was not ripe for review, its claim that the open space ordinance on its face constituted a taking was subject to review on the merits; and *Crow-New Jersey 32 Ltd. v. Township of Clinton*, 718 F.Supp. 378, 381-83 (D. N.J. 1989) – applying established Supreme Court precedents, the plaintiff's *facial* challenge to the ordinance was ripe for review, even though it had not obtained a final decision as to the application of the ordinance to its property.

B. Conflict With Other Ninth Circuit Precedents

At least until the per curiam opinion in this case, even the Ninth Circuit had recognized the fundamental difference between the proper ripeness standards applicable to *facial* challenges, as contrasted with *as-applied* challenges. Thus, for example, in *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141 (9th Cir. 1983), the Ninth Circuit clearly recognized this important distinction, noting:

> "[T]he failure to submit a development plan is not, in and of itself, a bar to an attack on the ordinance on 'its face.' " 703 F.2d at 1146-47.

Similarly, in *Lake Nacimiento Ranch Co. v. County of San Luis Obisbo*, 830 F.2d 977 (9th Cir. 1987), *amended* 841 F.2d 872 (1988), the Ninth Circuit dismissed the as-applied challenge as unripe, finding that there had neither been a rejected development plan, nor the denial of a variance. However, the court went on to note that the district court had "properly recognized that the Ranch may challenge the zoning restriction on the basis that the mere enactment" of the restriction constituted a taking of its property. 841 F.2d at 877. The court then proceeded to address the merits of the property owner's *facial* challenge.

As Judge Kozinski pointed out in his dissent in the instant case, the per curiam opinion also seems to be directly at odds with two other decisions of the Ninth Circuit where similar issues were presumably laid to rest. In *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1277 (9th Cir. 1977), Judge Kozinski noted that the court had held that a facial taking claim was not precluded merely because the governmental body had the "right" to amend the applicable law at some point in the future. "A governmental taking can always be undone if the government so chooses. That as [sic] never defeated a taking claim." *Id.*, citing several examples; App. A, 30a. Similarly, in *Herrington v. County of Sonoma*, 834 F.2d 1488, *amended* 857 F.2d 567 (9th Cir. 1988), he noted that the Ninth Circuit

also recognized the clear distinction between *variances* and *amendments* to legislative enactments. App. A, 30a-31a. In *Herrington*, even though the court had found that a variance request was not required, the court imposed no additional requirement that the Herringtons' attempt to seek an amendment to the plan which constituted the basis for their taking claim.

Most recently, in *Southern Pacific Transportation Co. v. City of Los Angeles*, 1990 WL 205207 (9th Cir. Sept. 7, 1990), *amended and refiled* Dec. 4, 1990, ___ F.2d ___, the Ninth Circuit again addressed the different ripeness standards applicable to an as-applied claim, distinguishing those from the "facial claim" of the property owner.[16]

III. THE MERE FACT THAT A PROPERTY OWNER HAS THE "RIGHT" TO SEEK AN AMENDMENT TO OR REPEAL OF A LAND USE ENACTMENT SHOULD NOT RENDER ITS FACIAL CHALLENGE ANY LESS RIPE FOR JUDICIAL REVIEW

In its apparent haste to fashion still another "ripeness bar" to facial challenges against land use enactments, the per curiam opinion seems to give unexpected meaning to a relatively benign provision of TRPA's Compact, a provision that on its face appears only to impose processing timelines. Thus, the per curiam opinion points with newfound importance to Article V(a)(2) of TRPA's Compact (App. E, 87a-88a), which provides in relevant part:

> "The governing body may adopt, modify, or reject the proposed plan or amendment, or may initiate and adopt a plan or amendment without referring it to the planning commission. If the

---

[16] Even in addressing the facial claim brought by the property owner in *Southern Pacific*, the Ninth Circuit appears to have again raised the ripeness bar to the courthouse, by finding the facial challenge "unripe" for judicial review because the property owner, in its complaint, had not shown that it had first sought compensation through state procedures.

governing body initiates or substantially modifies a plan or amendment, it shall hold at least one public hearing thereon after due notice as required by this subdivision.

If a request is made for the amendment of the regional plan by:

* * *

(2) The owner or lessee of real property which would be affected by such amendment, the governing body shall complete its action on such amendment within 180 days after such request is accepted as complete according to standards which must be prescribed by ordinance of the agency."

Fashioning an argument just cursorily mentioned in one of the respondents' briefs, an argument that was never seriously argued to nor addressed by the district court, the per curiam opinion attempts to distinguish TRPA's legislative scheme from all other similar land use planning processes – arguing in effect that because a provision of TRPA's Compact suggested a "right" for a citizen to seek such an amendment to the Regional Plan, that somehow the facial challenge at issue was entirely different from other types of facial challenges seeking constitutional redress.[17] As the per curiam opinion stated:

"Crucial to our decision is the fact that TRPA specifically invites amendment proposals

---

[17] While the per curiam opinion confers great importance on the provisions of Art. V(a)(2) regarding processing timelines, absolutely no recognition is given to the dilemma posed by an equally important deadline provision – the 60-day statute of limitations to initiate litigation "arising out of the adoption or amendment of the regional plan" found in Art. VI(j)(4). App. E, 105a. According to the per curiam opinion, apparently the Petitioners should have had the gumption to disregard the dictates of the 60-day statute of limitations, and instead should have filed their application to TRPA for an amendment to the Plan, trusting that a court would subsequently find they did the right thing.

and promises action on them within a reasonable time. * * * Virtually all statutes are subject to repeal or amendment, yet they are not for that reason alone, any less final, nor their effect any less certain. However, a statute that sets forth the specific procedure by which a person may seek to modify or ameliorate that statute's effect on him, and requires the governmental entity to act on its application within a reasonable time, presents an entirely different question." App. A, 10a-11a.

In rejoinder, Judge Kozinski forcefully argued:

"It makes not the least bit of difference that the Compact here establishes a formalized procedure for proposing amendments. Citizens don't need the government's permission to petition for a change in the law. That right is already guaranteed by the Constitution. *See* U.S. Const., Amend. I.

Nor does the 'requirement' that the TRPA act within 180 days provide anything of substance. For one thing, it is entirely hortatory; a political body cannot bind itself to take political action within a specific time frame. Failure to act within 180 days is plainly not judicially reviewable.

* * *

That the TRPA has given some assurance that it will consider and dispose of amendment requests promptly makes it no more likely that it will act on them favorably. Absent a guarantee that amendments proposed via this special procedure are to be given substantively favored treatment, there is no distinction whatever between amendments proposed according to this procedure and those considered under the more traditional rough-and-tumble processes employed by most legislative bodies.

The per curiam opinion thus would allow procedure to triumph over substance: By providing a meaningless mechanism for petitioning

> for legislative change, the TRPA would be able to delay or even preclude substantive judicial review of plaintiffs' constitutional claim. We should probably pause to consider what other constitutional claims can thus be shunted away from the courts and into the political arena, and for how long." App. A, 33a-36a.[18]

What is not mentioned nor addressed by either the per curiam opinion or the dissent, is the magnitude of the burden that is effectively passed to the complaining property owners should they now be compelled to first seek an amendment to the Regional Plan before they can have

---

[18] In footnote 5 of the per curiam opinion (App. A, 13a), the Court noted:

> "Likewise, we have no occasion to accept the dissent's darkly worded invitation to 'consider what other constitutional claims can thus be shunted away from the courts and into the political arena, and for how long.' Post, at 1346 [App. A, 34a-35a]. Suffice it to say that even the framers of the fifth amendment saw the wisdom of enumerating life, liberty, and property separately, and that few of us would put equal value on the first and third."

In response, Judge Kosinski observed:

> "The rejoinder that life is more important than property, per curiam op at 1338 n. 5 [App. A, 13a], obscures the fact that both are protected by the Bill of Rights and for that reason alone deserve solicitude – rather than thinly disguised contempt – from members of the judiciary. The fact is, the Constitution protects a variety of rights and liberties and reasonable minds might differ as to the relative importance of each. When we relegate certain of these to collateral status by refusing to give them the full measure of constitutional protection, we undermine the integrity of the constitutional structure and hand a potent weapon to those who may not share our vision as to which rights trump which." App. A, 35a.

their day in court.[19] Again, it must be kept in mind that the Regional Plan at issue here is the culmination of a long, contentious and costly process, during the course of which TRPA spent literally hundreds of thousands of dollars in undertaking environmental studies, holding and conducting public reviews and debate, and agonizing over the provisions of the plan. Yes, it may be true that a property owner has a "right" to seek an amendment to the Plan (just as any property owner does to any land use enactment). Even so, its application for such an amendment, as the Compact states, will not be "deemed complete" unless it meets the standards prescribed by the agency – standards, had the Court of Appeals inquired, which require the property owner to prepare and pay for costly new environmental studies to analyze the consequences of any such proposed amendment.[20]

In any event, the fact that aggrieved property owners may have the *right*, at their expense, to submit and pursue a request for an amendment to, or repeal of, the land use enactment, clearly makes the initial taking no less offensive. As Justice Brennan, in his oft-cited dissent in *San Diego Gas & Electric, supra*, 450 U.S. 621 (1981),

---

[19] Also, not mentioned by the per curiam opinion is the fact that although the TRPA Compact has an express provision setting forth a process for such plan amendments, certainly such "processing timelines" are not as unique as the opinion suggests. For instance, several provisions of California law require regulatory agencies to take action on land use permit applications within similar time periods. See, The California Permit Streamlining Act, Cal. Gov't Code §§ 65900-65963.1, particularly Cal. Gov't Code § 65950; and see, Cal. Pub. Res. Code §§ 21100.2 and 21151.5.

[20] At a minimum, assuming the per curiam "ripeness test" is upheld as appropriate in such facial challenge cases, basic fairness demands that the property owners ought to be given the opportunity to show that, as a factual matter, the pursuit of such an amendment would have been a "futile act," thereby excusing this ripeness criterion.

observed in an illuminating footnote, and admittedly in a slightly different context:

> "At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow City Attorneys the following advice:
>
> IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.
>
> If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case of *Shelby v. City of San Buenaventura*, 10 C. 3d 110, appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.
>
> * * *
>
> See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck." [Citing Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, in 38B NIMLO Municipal Law Review 192-193 (1975) (emphasis in original).] 450 U.S. at 655-56, fn. 22.

If the per curiam decision remains the law of the Ninth Circuit, how easy it will be for a public agency to insulate itself from judicial challenge by simply adopting some processing requirements for plan amendments. One can hear the clever city attorney now, at the next annual meeting of municipal law officers, explaining the newfound trick as to how to hold off a constitutional challenge:

> "Even where your city has enacted a land use regulation which you think is likely to be challenged, all you need to do is amend the city procedures to set forth timelines for processing

an amendment to such regulations. If you have such procedures, then guess what – the burden is shifted back to the property owner. Before he or she can challenge the regulation, and even though the property owner had spent a great deal of money and time in fighting the adoption of the regulation, nevertheless the property owner must begin all over again, and at the property owner's expense prepare a new environmental document analyzing the changes, submit a request for amendment or repeal, and then have it heard and processed by the city council (which already has made up its mind) before the courts will allow that property owner to file a claim for constitutional redress. In brief, bleed 'em until they go away."

CONCLUSION

For all the foregoing reasons, it is requested that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

LAWRENCE L. HOFFMAN
Counsel of Record
JAMES K. BURAU
HOFFMAN, LIEN & FACCINTO
3000 N. Lake Boulevard
Post Office Box 7740
Tahoe City, California 95730
(916) 583-8542

Counsel for Petitioners

January 25, 1991

APPENDICES

APPENDIX A

TAHOE-SIERRA PRESERVATION COUNCIL, INC., a California nonprofit corporation and membership organization, Plaintiffs-Appellants,

v.

TAHOE REGIONAL PLANNING AGENCY, a separate legal entity created pursuant to an interstate Compact between the States of California and Nevada, et al., Defendants-Appellees.

No. 86-2266.
United States Court of Appeals,
Ninth Circuit.
Argued June 10, 1987.
Submission Withdrawn July 16, 1987.
Resubmitted May 18, 1989.
Decided Aug. 9, 1990.
Amended Aug. 27, 1990.

Lawrence L. Hoffman, Hoffman, Lien, Faccinto & Spitzer, Tahoe City, Cal., for plaintiffs-appellants.

Gary A. Owen, Crowell, Susich, Owen & Tackes, Carson City, Nev., Marta Adams, Deputy Atty. Gen., Carson City, Nev., and Richard M. Frank, Deputy Atty. Gen., Sacramento, Cal., for defendants-appellees.

Appeal from the United States District Court for the District of Nevada.

Before FLETCHER, REINHARDT and KOZINSKI, Circuit Judges.

PER CURIAM:

We consider whether the plaintiffs' fifth and fourteenth amendment challenges to the defendants' 1984

Regional Plan have been rendered moot by the defendants' revocation of the challenged plan and its replacement with a substantially different one. We also consider whether the plaintiffs' claims are ripe for adjudication in federal court.

I. Facts

This case involves a challenge by 365 property owners on the Nevada side of the Lake Tahoe basin who claim that the ban on development established by Tahoe Regional Planning Agency ("TRPA")[1] Ordinance 81-5 (enacted June 25, 1981) and made permanent by the 1984 Regional Plan (enacted April 26, 1984) deprived them of all economically feasible use of their land, and also violated their right to due process and equal protection. The plaintiffs are divided into two groups: the first is composed of those who own land in areas classified as Stream Environment Zones (the "SEZ plaintiffs"); the second of those who own land in Class 1, 2, and 3 areas (the "Class 1, 2, and 3 plaintiffs"). All of the plaintiffs seek declaratory and injunctive relief as well as damages. The specific claims are as follows:

First Claim for Relief: The SEZ plaintiffs seek declaratory and injunctive relief against TRPA and the members of its governing body (the individual defendants) for

---

[1] The TRPA, created pursuant to the Tahoe Regional Planning Compact, 94 Stat. 3233 (the Compact), between California and Nevada, Pub.L. No. 91-148, 83 Stat. 360 (1969), amended Pub.L. 96-551, 94 Stat. 3233; Cal. Gov't Code §§ 66800-66801; Nev. Rev. Stat. §§ 277.190-.200, is authorized to coordinate regional planning for the Lake Tahoe Basin.

violations of the due process, equal protection and taking clauses. The district court granted summary judgment for defendants.

Second Claim for Relief: The SEZ plaintiffs seek damages from TRPA, Nevada, and California for violations of the taking clause. The district court dismissed as to Nevada and California on grounds of sovereign immunity and dismissed as to TRPA based on *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1977), *rev'd in part on other grounds sub nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979).

Third Claim for Relief: The Class 1, 2, and 3 plaintiffs seek declaratory and injunctive relief against TRPA and the individual defendants for violations of the taking clause. The district court granted summary judgment for defendants on ripeness grounds.

Fourth Claim for Relief: The Class 1, 2, and 3 plaintiffs seek declaratory and injunctive relief against TRPA and the individual defendants for violations of the due process and equal protection clauses. The district court granted summary judgment for defendants.

Fifth Claim for Relief: The Class 1, 2, and 3 plaintiffs seek damages from TRPA, Nevada, and California for violations of the taking clause. The district court dismissed as to Nevada and California on grounds of sovereign immunity, and dismissed as to TRPA based on *Jacobson*.

Sixth Claim for Relief: All plaintiffs seek declaratory and injunctive relief, or in the alternative, damages from

all defendants for deprivation of their rights to enjoy public improvements in violation of the due process, equal protection, contract, and taking clauses. The district court dismissed under *Furey v. City of Sacramento*, 592 F.Supp. 463 (E.D. Cal. 1984).

Seventh Claim for Relief: All plaintiffs seek injunctive relief and damages under section 1983 against all defendants based on the claims alleged above. The district court dismissed the claim for damages based on sovereign immunity as to California and Nevada, and dismissed as to TRPA based on *Jacobson*, and granted summary judgment with respect to the remaining claims.

II. Mootness

On July 15, 1987, TRPA adopted a new Regional Plan that was markedly different from the 1984 Plan it replaced. TRPA, California, and Nevada argue that the adoption of the 1987 Plan rendered the plaintiffs' lawsuit moot, and cite cases in which challenges to regulations or statutes were rendered moot by repeal or substantial amendment of the offending provisions. *See, e.g., Bunker Ltd. Partnership v. United States (In re Bunker Ltd. Partnership)*, 820 F.2d 308, 312-13 (9th Cir. 1987); *Aguirre v. S.S. Sohio Intrepid*, 801 F.2d 1185, 1189-91 (9th Cir. 1986); *Bradley v. Judges of the Superior Court*, 531 F.2d 413, 418 (9th Cir. 1976).

Insofar as the plaintiffs' taking claims are concerned, the defendants' arguments are foreclosed by *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), which held

that " . . . 'temporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *Id.* at 318, 107 S.Ct. at 2387. Thus, if Ordinance 81-5 or the 1984 Plan effected a taking, even for a short time, plaintiffs are entitled to just compensation for that temporary taking. Their claims for just compensation (Claims Two and Five, and portions of Claim Seven) are therefore not moot.

The defendants argue that the plaintiffs suffered no interim damages by reason of the 1984 Plan because it was enjoined before it took effect.[2] However, this argument fails to show that the plaintiffs' claims are moot, for two reasons. First, it is an argument about *causation*. It may well be that TRPA cannot be blamed for any diminution of the value of the plaintiffs' land, but if true, that fact would show only that TRPA committed no "taking"; the plaintiffs' claims would be meritless, not *moot*. Second, the defendants' argument fails to address the full

---

[2] On April 26, 1984, the same day TRPA adopted the 1984 Plan, the State of California brought suit against TRPA for declaratory and injunctive relief, arguing that the plan did not comply with the Tahoe Regional Planning Compact requirements. *California v. Tahoe Regional Planning Agency*, No. CIVS-84-0561 EJG (E.D. Cal. 1984). On August 9, 1984, the district court granted California's request for a preliminary injunction, and issued an order which "enjoined and restrained [TRPA] from taking any action to approve any project . . . or to approve the construction of any man-made development within the agency's jurisdiction," with certain limited exceptions not relevant to this case. Order Granting Preliminary Injunction at 3. This order was affirmed on appeal. *California v. Tahoe Regional Planning Agency*, 766 F.2d 1308 (9th Cir. 1985).

scope of the plaintiffs' claims. The plaintiffs claim damages dating from June 25, 1981, when Ordinance 81-5 was enacted. Even if we were to assume that all *post*-injunction damages were caused by the injunction rather than the Plan, the plaintiffs' claims for *pre*-injunction damages would be unaffected. Thus, the issuance of the preliminary injunction does not render the plaintiffs' claims moot.

Claim Six of the complaint requests compensation for assessments imposed on plaintiffs to finance public improvements that, because of the total ban on development of their lots, inured exclusively to the benefit of others. *See Furey v. City of Sacramento*, 780 F.2d 1448, 1455 (9th Cir. 1986) (where government imposes assessment on landowner to finance construction of public improvement, "the landowner must be given the opportunity to make beneficial use of the improvement or must be refunded the amount of the assessment"). While the plaintiffs may be able to develop their lots under the 1987 Plan, and thereby take advantage of the public improvements they have financed, that fact would not foreclose the possibility that they may have suffered *Furey* injury by reason of the six-year moratorium on development. It is entirely possible, for example, that some of the assessments the plaintiffs paid were used to finance maintenance work or short-term projects, the benefits of which were entirely consumed during the moratorium period. Accordingly, Claim Six is not moot to the extent it seeks reimbursement for assessments paid to finance projects from which the plaintiffs could have derived no benefits ever if they were to develop their property under the 1987 Plan.[3]

---

[3] We address the merits of the district court's dismissal of Claim Six in Part V, *infra*.

The claims for declaratory and injunctive relief are in a different category. It would be pointless to enjoin enforcement of a regional plan that is no longer in effect; claims for such relief have been rendered moot by adoption of the 1987 Plan. It would be equally pointless to render a declaratory judgment that the 1984 Plan is "null and void," as plaintiffs ask us to do in their claims seeking declaratory relief. Accordingly, the judgment below as to Claims One, Three, and Four (which request only equitable relief) is vacated. To the extent that Claims Six and Seven involve equitable relief, they are remanded with instructions to dismiss those portions of the complaint as moot. *See In re Bunker Ltd. Partnership*, 820 F.2d at 311 ("[w]here intervening legislation has settled a controversy involving only injunctive or declaratory relief, the controversy has become moot").

Resolution of the mootness issue eliminates the equitable claims against all defendants, and the plaintiffs do not challenge the district court's dismissal of the claims for damages against Nevada and California. Thus, the plaintiffs are left with only the claims for damages against TRPA and the individual defendants (Claims Two and Five, and portions of Claims Six and Seven).

III. Ripeness

The defendants point to several features of the 1984 Plan that provide potential relief from the prohibition on development of the plaintiffs' lots. Relying on *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), and *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340,

106 S.Ct. 2561, 91 L.Ed.2d 285 (1986), the defendants argue that the plaintiffs' claims are not ripe because they have not sought to avail themselves of these potential administrative remedies.

To evaluate the defendants' contentions, it is necessary to keep three relevant time periods in mind. First, there is the period from June 25, 1981 until August 28, 1983. During this time period, Ordinance 81-5 prohibited development of any Class 1, 2, or 3 lots and of any lots in SEZs. However, there was a limited exception on the Nevada side of the basin which permitted TRPA to approve construction of some single-family homes on Class 1, 2, and 3 lots. Second, there is the period from August 29, 1983 until April 26, 1984. During this period, the case-by-case approval system on the Nevada side had expired but the prohibition imposed by Ordinance 81-5 was still in effect. This amounted to a complete moratorium on development for approximately eight months. Finally, there is the period after April 26, 1984, when the 1984 Plan had been approved and was in effect (although a federal district court had enjoined TRPA from approving any projects under the Plan). With these time periods in mind, we address each of the defendants' contentions regarding ripeness.

A. Amendment of the 1984 Plan

The defendants contend that the plaintiffs should have sought amendment of the 1984 Plan, because Article V(a) of the Compact requires TRPA to consider requests for amendment. We agree. The Compact specifically requires TRPA to act upon a property owner's request for

a change in administrative policy within 180 days. *See* Compact Article V(a)(2), codified in Cal. Gov't Code § 66801 (TRPA must act "within 180 days after [the requested amendment] is accepted as complete according to standards which must be prescribed by ordinance of the agency"). This part of the Compact provides the plaintiffs with an opportunity to obtain administrative action regarding their plans for development, and offers the same possibility regarding development as does a system for requesting variances. Accordingly, we conclude that the plaintiffs were required to request that TRPA amend the Plan before they filed this action, and that their failure to do so renders unripe their taking claims for the period after April 26, 1984. *See Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987) (claim for regulatory taking is not ripe until there is a final decision, which requires "(1) a rejected development plan, and (2) a denial of a variance"); *Herrington v. County of Sonoma*, 857 F.2d 567, 569-70, *amending* 834 F.2d 1488 (9th Cir. 1988) (restating the *Kinzli* requirement but finding that it was excused in that case by the futility doctrine).

The requirement that landowners seek a variance before commencing a regulatory taking claim derives from the special necessity in such cases of determining exactly how much a land use regulation interferes with an individual's use of his property. *MacDonald, Sommer & Frates*, 477 U.S. at 348-49, 106 S.Ct. at 2565-66; *Williamson*, 473 U.S. at 190-91, 105 S.Ct. at 3118-19. Because a would-be plaintiff may escape economic injury entirely if he is granted a variance exempting him from some or all of the strictures written into an ordinance, his case is not ripe

for adjudication until the governmental entity has denied at least one such request. A procedure for procuring an amendment to the regulation also presents the possibility that a would-be plaintiff will be preserved from economic injury. The means differ, of course: an amendment changes the applicable regulation while a variance merely waives some or all of the regulation in its application to specific person or class of persons. However, regardless of the means used, the fact remains that under either system, the taking that will occur "by default," i.e., if the landowner seeks neither form nor relief, can be avoided through positive action according to a statutorily prescribed procedure. Because either procedure can be utilized to mitigate or eliminate the disabilities imposed by local land regulations, we believe either must be pursued before a regulatory taking claim is ripe for judicial determination. In the words of the dissent, "Where such flexibility is built into a law, plaintiffs should first demonstrate that the law nevertheless does not accommodate their demands before they attack it as unconstitutional." *Post*, at 1344.

Crucial to our decision is the fact that TRPA specifically invites amendment proposals and promises action on them within a reasonable time. This case thus differs fundamentally from *Hall v. City of Santa Barbara*, 833 F.2d 270 (9th Cir. 1987), *cert. denied*, 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988). The statute in *Hall* was a general rent-control ordinance, and the defendants argued that the plaintiff's claim was unripe because the ordinance could be repealed. We rejected this argument. We held that a taking claim is not precluded simply because a governing body may, under its general authority to act, amend applicable ordinances or statutes at

some time in the future. 833 F.2d at 1277. Our holding merely reflected the basic principle that government action is not protected from judicial review by the mere possibility that the offending government body may someday of its own volition change its ways. Virtually all statutes are subject to repeal or amendment, yet they are not for that reason alone any less final, nor their effect any less certain. However, a statute that sets forth a specific procedure by which a person may seek to modify or ameliorate that statute's effect on him, and requires the governmental entity to act on his application within a reasonable time, presents an entirely different question. Here, the Compact expressly provides that TRPA must take action, within a finite and reasonable period, on any interested party's request for an amendment to the plan. We find nothing in the Compact that prevents property owners from using this amendment procedure to obtain the same results they could obtain by way of variance; thus, we are unable to draw any distinction between the two forms of relief that is not purely formal.[4] In short, we

---

[4] The dissent asserts that in *Herrington*, "we recognized the distinction between variances and amendments." *Post*, at 1345. It points out that the Herringtons' claims were not rendered unripe by the fact that an amendment to Sonoma County's General Plan was available to them. However, the basis for that conclusion was that an application for such an amendment would have been futile in the Herringtons' case. 857 F.2d at 569-70. Especially in view of the fact that we also excused the Herringtons' failure to request a *variance* on the

(Continued on following page)

are compelled to conclude that plaintiff's failure to utilize such a system, barring futility, will make his claims unripe.

In arguing that the specific provisions of Article V(a) of the Compact do not require property owners to seek available administrative relief before challenging the constitutionality of the Regional Plan, the dissent fails to give any practical effect to that article. The dissent remarks, somewhat disingenuously, that "[c]itizens don't need the government's permission to petition for a change in the law," *post*, at 1346, but this epigram misses the point. Although Article V(a) does not – and certainly *ought* not – "guarantee that amendments proposed via this special procedure are to be given *substantively favored* treatment," *post*, at 1346 (emphasis added), the provision does require that the complaints of aggrieved landowners be addressed, and that action – favorable or unfavorable – be completed no later than six months after the proposed amendments are lodged with TRPA. Article V(a) thus provides an adversely affected citizen with an effective means of submitting a specific course of conduct to TRPA and forcing TRPA to act on his submission.

We would be among the last to deny that the constitutionally protected right to petition for redress of grievances is an important liberty, but we intend no disparagement when we observe that the right to present

---

(Continued from previous page)

ground that a *variance* application would also have been futile, there is simply no basis for asserting that *Herrington* requires us to treat amendments and variances differently for ripeness purposes.

one's views in a letter to an elected official carries with it no means of inducing that official or anyone else in the government to act on any specific measure. The constitutional privilege simply bears little resemblance to the statutory right granted by Article V(a), and the dissent errs seriously in suggesting that the more specific right "makes not the least bit of difference" and fails to "provide anything of substance," *post*, at 1346. TRPA's procedure guarantees disappointed citizens more than the opportunity to make public suggestions that laws be amended or repealed; it guarantees them that the Agency will act upon their proposal and do so within six months. Given the complexities of land use planning, and particularly the interrelatedness of each proposed use with each other use, this period does not seem unreasonably long to us.[5] While we agree with the Supreme Court that

---

[5] Obviously a procedure designed to keep aggrieved landowners on ice *indefinitely*, or for longer than the government could reasonably require in order to reach a final decision under the circumstances, would present a different question. Requiring the plaintiffs to give the government one last chance before filing a regulatory taking suit in federal court will postpone the potential vindication of their rights by somewhat less than other state procedures that plaintiffs are unquestionably required to exhaust before they sue. *See, e.g., Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398, 1403 (9th Cir. 1989) (*per* Kozinski, J.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990).

Likewise, we have no occasion to accept the dissent's darkly worded invitation to "consider what other constitutional claims can thus be shunted away from the courts and into the political arena, and for how long." *Post*, at 1346. Suffice it to say that even the framers of the fifth amendment saw the wisdom of enumerating life, liberty, and property separately, and that few of us would put equal value on the first and the third.

property owners need not "resort to piecemeal litigation or otherwise unfair procedures," *MacDonald, Sommer & Frates*, 477 U.S. at 350 n. 7, 106 S.Ct. at 2567 n. 7; *see also Kinzli*, 818 F.2d at 1455; the procedure at issue here places no such burdens on the plaintiffs.

Finally, we simply do not understand why the dissent would have us distinguish variances from amendment requests on the ground that one is administrative while the other is political. For one thing, we cannot see what makes the process governed by Article V(a) political rather than administrative. TRPA's amendment procedure, like the hypothetical variance procedure supposed by the dissent, is "defined by the challenged law itself" and is, "by [its] nature, finite." *Post*, at 1345. Moreover, the Compact sets forth certain limitations on the permissible content of the Regional Plan, and we see no reason not to equate these limitations with "guidelines for what variances are permissible." *Id.* Conversely, if a political body is one that "needs no ascertainable reason at all for changing course [and] is constrained only by the Constitution and the principles of political accountability," *post*, at 1345, then TRPA does not seem to qualify.

In any event, the dissent's attempt to distinguish variances from amendments appears to be based on a fundamental misconception of the process by which such decisions are made. The dissent seems to believe that variances are the province of bureaucrats with green eyeshades who, based solely on the principles of engineering or mathematics, apply slide-rules to citizens' requests;

while amendments are considered by Machiavellian politicians who are concerned principally with issuing political decisions that will advance their careers. That is simply not the case. Variance applications frequently raise controversial political questions which engender substantial community division and debate; ultimately, many are decided on broad policy grounds. Moreover, such decisions may well be made by the very same legislators who act on proposals to amend zoning legislation. For example, in the City of Los Angeles, the loser in a zoning variance battle has the right to appeal the decision to the City Council, where the fifteen elected members of that body make the final decision, subject only to the Mayor's right to veto their action. Los Angeles Municipal Code §§ 12.27-12.28. Thus, the distinction relied on by the dissent simply does not exist.

The more fundamental legal problem with the proposed distinction is that it finds no support in the concept of ripeness. The doctrine that a regulatory taking claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," *Williamson*, 473 U.S. at 186, 105 S.Ct. at 3116, has nothing to do with the character of the government entity involved. The question is rather the character of the *decision*, and although the finality of the decision depends in part upon the nature of the process by which it may be changed, we must evaluate that process by examining its actual features, not merely by calling it either political or administrative. Certainly as long as the process is limited and reasonably short in duration, and is guaranteed to culminate in either a "yes" or a "no," we

believe the plaintiffs are required to pursue it. Because the plaintiffs here failed to request an appropriate amendment, their claims are not ripe insofar as they concern any temporary taking that may have occurred after the enactment of the 1984 Plan on April 26, 1984.[6]

B. The Case-by-Case Exception to Ordinance 81-5

Under Ordinance 81-5, an interim prohibition was placed on any development of Class 1, 2, or 3 land after June 25, 1981, but a case-by-case system for approving construction of single-family homes in these areas was in effect on the Nevada side of the Tahoe basin until August 28, 1983. Again, the Class 1, 2, and 3 plaintiffs, all of whom own land on the Nevada side of the basin, do not allege that any of them attempted to take advantage of this system. Therefore, the claims of the Class 1, 2, and 3 plaintiffs for the period from June 25, 1981, through August 28, 1983, are also unripe. In effect, then, these plaintiffs are left with a facial challenge to an eight-month moratorium on development from August 29, 1983 until the adoption of the 1984 Plan on April 26, 1984. However, the situation of the SEZ plaintiffs is quite different. Ordinance 81-5 did not permit any construction in SEZs, and there was no provision for case-by-case exceptions to this

---

[6] The defendants also argue that the plaintiffs' claims are unripe because of the availability of transfer of development rights ("TDRs") under the 1984 Plan. In view of our conclusion that the plaintiffs' taking claims for the period after the effective date of the 1984 Plan are unripe, we need not decide the merits of this contention.

prohibition. Because there was no way for the SEZ plaintiffs to apply for building permits, their claims survive this ripeness challenge.

The defendants argue that they cannot be held liable for imposition of a temporary moratorium for a reasonable period of time during which they were diligently drafting a new land use plan. We need not determine the continuing availability of this defense after *First English*. In any event, the reasonableness of the delay and the diligence of the government's efforts are clearly questions of fact that cannot be resolved at this point in the proceedings. Accordingly, the existence of the case-by-case exception renders Claims Five and Seven unripe only in the case of the Class 1, 2, and 3 plaintiffs, and only to the extent that they seek damages for the period before August 28, 1983.

C. Land Classification Challenges

The defendants also argue that the plaintiffs' claims are unripe because they failed to challenge the land capability classifications of their properties in the manner provided by Ordinance 81-5. The Ordinance permits any interested person to challenge a land capability district classification. The plaintiffs contend that they have always conceded that their land capability districts (and thus their properties) were correctly classified under TRPA's classification scheme, and that they therefore have no basis for seeking reconsideration of TRPA's decisions.

The defendants point to language in the complaint and in two of the plaintiffs' affidavits criticizing the accuracy of the classification scheme, known as the "Bailey System." However, reading these criticisms in context, we think it fair to conclude that the plaintiffs allege only that the Bailey System is overbroad, and thus deficient, insofar as it serves as basis for the prohibitions imposed by TRPA in the 1981 ordinance. They argue that because the Bailey System classifies large areas containing many lots, it does not reflect the characteristics of a particular lot accurately enough to justify a prohibition on development of that lot. Hence, the plaintiffs challenge only the reasonableness of using the Bailey System to prohibit development on particular lots without any on-site inspection of the lots in question; they do not challenge the accuracy of TRPA's application of the Bailey System to any particular land capability districts or the lots situated therein. Consequently, it would serve no purpose to require the plaintiffs to challenge the individual classifications of their properties, classifications with which they have no disagreement. *See Whitney Benefits, Inc. v. United States*, 752 F.2d 1554, 1558 (Fed. Cir. 1985) ("the exhaustion doctrine does not require [the plaintiffs] to do anything so absurd as to pursue to the bitter end . . . an attack on a state decision denying them a permit to mine, which decision they believe to have been correct").

Although this interpretation of the plaintiffs' allegations adequately explains why they had no duty to use the reclassification provisions of Ordinance 81-5, it raises an additional question: whether the plaintiffs were required to propose an amendment to the plan that

preceded the 1984 Plan,[7] either refining or abolishing the Bailey System. Arguably, the plaintiffs' dissatisfaction was as much with the Bailey System itself as with the prohibitions of Ordinance 81-5;[8] in line with our discussion in Part III.A *supra*, one could conclude that the plaintiffs were obliged to propose an amendment to the 1971 Plan before challenging the Bailey System in court.

However, we need not resolve this issue, because we believe that offering a proposed amendment during a time when TRPA was in the process of drafting a new plan would have been futile. Whether the plaintiffs were injured by the Bailey System itself or only by the prohibitions contained in Ordinance 81-5 (which were based on the classifications made under the Bailey System), it is certain that they were not injured at all until Ordinance 81-5 went into effect on June 25, 1981. From that time until the 1984 Plan was adopted (after which date the plaintiffs' claims were unripe for other reasons, as we have already held), TRPA was trying to resolve the very

---

[7] The Bailey System was apparently not adopted until 1974, and thus could not have been in the original version of the 1971 Plan, which was still in use in 1980. The record does not show whether the Bailey System was later incorporated into the 1971 Plan, but we assume for the purposes of our discussion that it was, and that it would therefore be possible to reform the Bailey System by amending that Plan.

[8] If the dissatisfaction related to the ordinance, there would be no need to request an amendment prior to filing an action. The amendment requirement stems from Article V(a) of the 1980 Compact, providing for amendment of plans. There is no comparable provision with respect to amendment of ordinances.

issues to which any proposed amendment would have been addressed. No purpose would have been served by asking TRPA to decide those questions earlier than it did. We believe the plaintiffs were entitled to allow TRPA to present its first draft for public discussion before attempting to improve upon TRPA's work.

D. "Buyout" Programs

The defendants' final contention is that the plaintiffs' claims are unripe because the United States, California, and Nevada have each instituted "buyout" programs to purchase certain environmentally sensitive lots in the Lake Tahoe area. We fail to see how any of these programs make the effect of TRPA's actions any less certain. First, the California program is simply irrelevant because it makes no provision for the purchase of any of the properties at issue in this case, all of which are located in Nevada. Second, the Nevada program was not enacted until after the plaintiffs filed their lawsuit – indeed, after the district court disposed of the plaintiffs' claims. Those claims were therefore ripe when filed.[9] Finally, the federal buyout program, which *was* in existence during the relevant time period and which could conceivably result in some of the plaintiffs' properties being purchased, is administered by an entirely different sovereign; it is not "compensation" (just or otherwise), either from TRPA or from either of the states that are parties to the Compact.

---

[9] We express no view of the effect this subsequently enacted statute may have upon the merits of the plaintiffs' case.

The plaintiffs' remaining claims are therefore not rendered unripe by the existence of these buyout programs.

IV. TRPA's Immunity

The district court held, under the authority of *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1358 & n. 7 (9th Cir. 1977), *rev'd in part on other grounds sub nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979), that TRPA was immune from monetary liability for inverse condemnation. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 611 F.Supp. 110, 116-17 (D. Nev. 1985). In *Jacobson* we reasoned that "TRPA was given only the power to regulate, not the power to condemn," *id.* at 1358 n. 7, and therefore could not be liable in damages for inverse condemnation. This reasoning is at odds with *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), wherein the Court stated: "While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings." *Id.* at 316, 107 S.Ct. at 2386. As the Court held, even a temporary regulation of land may result in a substantial burden to landowners, and "[w]here this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period. Invalidation of the ordinance . . . is not a sufficient remedy to meet the

demands of the Just Compensation Clause." *Id.* at 319, 107 S.Ct. at 2388 (citation omitted).

First English does not squarely overrule *Jacobson*, because the defendant in *First English*, unlike TRPA, did in fact possess the power of condemnation; it merely chose not to exercise it. Any attempt to rely on this distinction would, however, unavoidably conflict with the reasoning of *First English*: Governments cannot avoid the strictures of the Constitution through the expedient of delegating regulatory powers, but not the power of eminent domain, to independent government entities that would then be free to zone away all use of private property without fear of liability. As the Court observed, "[I]t is the Constitution that dictates the remedy for interference with property rights amounting to a taking." 482 U.S. at 316 n. 9, 107 S.Ct. at 2386 n. 9. After *First English*, any government entity that regulates away all economically viable use of property must be prepared to pay just compensation. We therefore reverse the district court's dismissal on immunity grounds (as against TRPA only) of the ripe portions of Claims Two and Five, and, to the extent they request damages against TRPA, the ripe portions of Claims Six and Seven.

V. The District Court's Dismissal of Claim Six

The district court dismissed Claim Six on the authority of the lower court opinion in *Furey v. City of Sacramento*, 592 F.Supp. 463 (E.D. Cal. 1984), *aff'd*, 780 F.2d 1448 (9th Cir. 1986). The court reasoned that Claim Six seeks to recover both the benefit of use of the improvements and the actual amount of the assessments paid, and that these

are merely two of the "sticks" making up the "bundle of rights" that property ownership comprises. Since it viewed Claim Six as "merely an attempt to subdivide the property rights of plaintiffs" and obtain double compensation, the court granted the defendants' motion to dismiss. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 611 F.Supp. 110, 118 (D. Nev. 1985).

Our holding in *Furey* is at cross-purposes with the district court's conclusion here. While we indicated that the ability to use public improvements financed by assessments is one of the attributes of property ownership that cannot be isolated from the property itself for purposes of a taking claim, 780 F.2d at 1453-54 n. 4, we held that landowners could state a claim for reimbursement of assessments independent of any claim for taking of the land itself. *Id.* at 1453-54 n. 4, 1455. Under *Furey,* therefore, we must reverse the district court's dismissal of Claim Six.

However, although *Furey* allows recovery under circumstances such as those alleged here, it also suggests that any recovery of assessments should be from the party that controls the assessment fund, rather than from the government entity that enacted the zoning ordinance that caused the alleged taking. Plaintiffs do not specify in their complaint who collected the assessments. They do, however, allege that "[a] significant portion of the expenses of [the public works projects] was funded by assessments against private properties in the Lake Tahoe Basin levied pursuant to applicable laws of [Nevada and California]." If TRPA collected assessments, the appropriate remedy would lie with that entity. If, on the other

hand, some other entity was responsible for collecting the assessments, then it would be inappropriate to require TRPA to provide the refund. We therefore reinstate Claim Six only to the extent that it seeks reimbursement for assessments actually paid by the plaintiffs to TRPA.[10] If some other government body collected the assessments, then on remand the plaintiffs may seek leave to amend their complaint to name the appropriate entity.[11]

VI. Conclusion

As to:

Claims One, Three, and Four: The district court's rulings are vacated and the district court is instructed to dismiss them as moot.

Claim Two: The district court's dismissal of the claim against TRPA is reversed with respect to the period before April 26, 1984; the district court's dismissal with respect to the remainder of this claim is affirmed.

Claim Five: The district court's dismissal of the claim against TRPA is reversed with respect to the period after August 29, 1983 and before April 26, 1984; the dismissal of the remainder of this claim is affirmed.

Claim Six: The district court's dismissal is reversed with respect to assessments actually paid by the plaintiffs

---

[10] Of course, any compensation the plaintiffs receive on their taking claim would have to be offset by any reimbursement they receive under *Furey*.

[11] We express no view on any of the possible statute of limitations issues that might be raised.

to TRPA in order to finance projects and expenditures from which the plaintiffs could derive no benefit even if they were to develop their property under the 1987 Plan. The district court's rulings with respect to the remainder of the claim are vacated and the district court is instructed to dismiss those portions as moot.

Claim Seven: The district court's dismissal of the plaintiffs' claim against TRPA for damages accruing after April 26, 1984 is affirmed; the district court's dismissal of the Class 1, 2, and 3 plaintiffs' claim against TRPA for damages accruing prior to August 29, 1983 is affirmed; and the district court's dismissal of the remaining portions of the claim seeking damages against TRPA is reversed. The district court's rulings with respect to the remainder of the claim are vacated and the district court is instructed to dismiss those portions as moot.

FLETCHER, Circuit Judge, special concurrence:

I specially concur in the majority opinion. I am in full agreement except for the rationale it adopts in section III.A to deny damages in the period *post* April 26, 1984 and its conclusion in section II on the importance to this case of a court injunction against TRPA in other litigation. Since I conclude plaintiffs have stated no claim for which relief can be granted, I would not reach the ripeness issue. Because court orders prevented the 1984 Plan from going into effect, plaintiffs cannot state or prove that the Plan caused them injury.

The effective date of the Plan was April 26, 1984. The State of California and the League to Save Lake Tahoe sued TRPA on April 26 and 27, 1984, in the United States District Court for the Eastern District of California. A

scant few days later, on May 1, the court issued a temporary restraining order prohibiting TRPA from taking any action to approve building projects and ordered TRPA to show cause why a preliminary injunction should not issue. Order to Show Cause and Temporary Restraining Order at 3, *California v. Tahoe Regional Planning Agency*, No. CIV. S-84-0561 EJG (E.D. Cal. May 1, 1984).[1] The order initially was to expire on May 31 but was extended until June 11. Order Granting Preliminary Injunction at 2 (Aug. 9, 1984). On June 11, the court held a hearing on the order to show cause. By memorandum decision dated June 15, the court granted a preliminary injunction containing the same restrictions as the TRO and extending the TRO until the court's formal order granting the injunction could be issued. Memorandum of Decision June 15, 1984); Order Granting Preliminary Injunction at 2. The court's subsequent August 9 order granting the injunction contained the same restrictions as the TRO and June 15 memorandum decision: TRPA was enjoined from taking any action to approve any construction project.

The TRO and injunction, not the Plan, prevented the plaintiffs from building on their property. The TRO and the injunction forbade even the limited development allowed under the Plan. The plaintiffs claim that TRPA's wrongdoing leading to the injunction should not protect it from liability here. However, the court granted the injunction based on California's and the League's claim

---

[1] In this and subsequent orders, the court made an exception for "circumstances of imminent threat to public health, safety and welfare." Order to Show Cause and Temporary Restraining Order at 3.

that the Plan was not restrictive enough: it would permit construction of single-family residences in excess of Compact limits and inflict environmental damage, and the Plan also did not abide by the Compact's stricter procedural requirements for project approval. *California v. Tahoe Regional Planning Agency*, 766 F.2d 1308, 1312 (1985). TRPA's error was not that claimed by plaintiffs here, that is, being too restrictive, but was instead being too lenient. In short, the "wrongdoing" plaintiffs claim here was not the "wrongdoing" that triggered the injunction.

Because the court imposed the moratorium, TRPA's adoption of the 1984 Regional Plan was not an actionable cause of plaintiffs' claimed injury. The TRO issued only five days after the Plan's effective date, effectively preventing the 1984 Plan from ever being implemented. Amendment of the Plan to meet the California court's objections would not have freed the lots for development.[2] The esoteric distinctions between plan amendments and variances, and between quasi-judicial and legislative actions of local governmental bodies, can and should be avoided in this case.[3] I would affirm simply on the basis I have indicated.

---

[2] Although there were a few days between April 26, when the Plan took effect, and May 1, when the temporary restraining order took effect, the plaintiffs cannot claim that they could have completed all the necessary prerequisites to building, including getting a TRPA permit, within those few days.

[3] If I were to address the "ripeness" issue, I simply would hold that transfer of the plaintiffs' development rights granted under the 1984 Plan was a prerequisite to any claim against

(Continued on following page)

KOZINSKI, Circuit Judge, dissenting* in part:

I join all but section III.A. of the per curiam opinion. That section equates a request for amendment with a request for a variance, and concludes that plaintiffs' taking claim for the post-1984 period is not ripe because plaintiffs did not request an amendment to the Plan. This notion is contrary to prior case law and overlooks a fundamental distinction between variances and amendments.

I

In the regulatory area, not all deprivations of property amount to taking; compensation is required for only those deprivations that go "too far" and have the same effect as an appropriation of the property through eminent domain or physical possession. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199, 105 S.Ct. 3108, 3123, 87 L.Ed.2d 126 (1985); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978). It is

---

(Continued from previous page)

TRPA, rendering any claim unripe. See majority opinion, p. 1339 n. 6. Lack of causation makes it unnecessary for me to do so.

* Although, in the time-honored tradition, this is styled a dissent, it is more in the nature of a disagreement. Because section III.A of the per curiam opinion commands only one vote, it is not, of course, a holding of this court. Nevertheless, since two members of the panel find it necessary to reach the issue of whether plaintiffs' post-1984 claim is ripe, it is appropriate to set forth our disagreement regarding how that issue should be resolved.

therefore critical that a reviewing court know precisely what deprivation a regulation has created. "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348, 106 S.Ct. 2561, 2565, 91 L.Ed.2d 285 (1986). Knowing how far the regulation goes requires that "the government entity charged with implementing the regulations [have] reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186, 105 S.Ct. at 3116.

Where the regulation or ordinance in question allows for variances, a "final decision" requires that the agency charged with implementing the law have turned down at least one request for a variance. *See, e.g., Williamson*, 473 U.S. at 188-89, 193-94, 105 S.Ct. at 3117-18, 3120; *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454, *amended* 830 F.2d 968 (9th Cir. 1987); *Herrington v. County of Sonoma*, 834 F.2d 1488, *amended* 857 F.2d 567, 569-70 (9th Cir. 1988). This rule makes some sense. A variance is a means by which a land use regulation can be tailored to meet individual needs. Where such flexibility is built into a law, plaintiffs should first demonstrate that the law nevertheless does not accommodate their demands before they attack it as unconstitutional.

II

The per curiam opinion would extend the variance rule beyond its sensible bounds, by requiring plaintiffs to have asked the TRPA to amend the Plan before coming to

court. This extension is at odds with both our prior case law and common sense.

A. In *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1277 (9th Cir. 1987), we held that a taking claim is not precluded because a governing body may amend applicable laws at some time in the future. "A governmental taking can always be undone if the government so chooses. That as [sic] never defeated a taking claim." *Id.* (citing several examples).

In *Herrington v. County of Sonoma*, 834 F.2d 1488, *amended at* 857 F.2d 567 (9th Cir. 1988), we recognized the distinction between variances and amendments. In that case, the Herringtons did not request a variance from the county. Nonetheless, we held that this failure did not render their taking claim unripe because, under California law, the variance they needed couldn't have been granted anyway. 857 F.2d at 569-70. A variance request was therefore not required, and the Herringtons met the finality requirement because "the *only* means of obtaining approval of [their] proposal was through a General Plan amendment." *Id.* at 570 (emphasis in original).[1] We

---

[1] The per curiam's attempt to torture the holdings in *Kinzli* and *Herrington* into supporting its position, per curiam op at 1337, does not survive a careful review of those cases. The error lies in a failure to recognize that when *Kinzli* (and *Herrington* by incorporation) require the landowner to have submitted a "development plan," they are merely saying that the owner must tell the planning board what he would like to do with his property. This has nothing to do with requesting that the governing law be amended.

The per curiam opinion reaches a conclusion by sleight of hand: "Especially in view of the fact that we also excused the

(Continued on following page)

imposed no additional requirement that the Herringtons attempt to have the plan amended. Yet the per curiam opinion would do precisely this – and create a square conflict with our prior decisions in *Hall* and *Herrington*.

B. The per curiam opinion seeks to distinguish *Hall* based on the fact that the Compact here allows land owners to ask for amendments and requires action by the TRPA within 180 days. *See* per curiam op at 1337-1338; Compact Article V(a)(2). The per curiam opinion perceives no difference between the amendment procedure and the variance procedure. However, a difference there is, and it is fundamental.

A decision denying a variance is final, whereas a decision not to amend a law never is. This is because a request for an amendment is directed to a wholly different process than a request for a variance. A variance may be granted or denied according to an administrative process defined by the challenged law itself. Administrative processes are, by their nature, finite; so long as the governing ordinance or regulation remains unchanged,

---

(Continued from previous page)

Herringtons' failure to request a variance on the ground that a variance application would also have been futile, there is simply no basis for asserting that *Herrington* requires us to treat amendments and variances differently for ripeness purposes." Id. (emphasis omitted). But this is precisely the contrary of what *Herrington* says. What we held in *Herrington* is that once it is clear that the proposed development plan does not fit within the governing law, the owner has exhausted and need not go the next step of asking for a change in the law. Far from treating variances and amendments as equivalent, *Herrington* treated them as antithetical.

denial of a variance acts as a bar to further requests of the same type. Moreover, the governing law sets guidelines for what variances are permissible. It is therefore possible for the government entity charged with implementing the regulation to give plaintiffs a "final decision" as to whether their desired land use will be allowed under existing law. Indeed, when it is clear that the governing law does not permit the kind of variance plaintiffs need, they needn't even ask. *Herrington*, 857 F.2d at 569-70.

An amendment, on the other hand, requires an exercise of political judgment. Political processes are, by their nature, infinite. A change in the makeup of the legislative body, a shift in the political winds, or even a change in attitude based on further experience or additional wisdom, may be a sufficient reason for a political body to change its mind. In fact, a political body needs no ascertainable reason at all for changing course; it is constrained only by the Constitution and the principles of political accountability. There is thus no way for a court to say that a legislative process has come to rest with respect to a challenged law.[2]

---

[2] Granted, at the local government level the distinction between legislative and administrative action is not as clear-cut as at the state or federal level. But, the per curiam's trivialization of the issue notwithstanding, the distinction has very significant consequences. For example, when the members of a local governing body act legislatively, they are entitled to absolute immunity, *Lake Country Estates, Inc. v. TRPA*, 440 U.S. 391, 394, 406, 99 S.Ct. 1171, 1173, 1179, 59 L.Ed.2d 401 (1979) (holding that to the extent that members of the TRPA acted legislatively in adopting a land use ordinance, they were

(Continued on following page)

The per curiam opinion suggests that a court could excuse further amendment requests on the theory that such requests would be futile. See per curiam op at 1337 (stating that "barring futility," a plaintiff's failure to utilize the amendment procedure renders his claim unripe). But how does one determine futility? Is it ever possible to say that a political institution will fail to change its mind about an amendment that it has already rejected? Are courts even competent to render such a judgment? To require plaintiffs to demonstrate that a governing body has made a final decision about what amendments it will allow is to preclude judicial review altogether, as each day brings a new opportunity for the legislature, in its wisdom, to change the law.[3]

It makes not the least bit of difference that the Compact here establishes a formalized procedure for proposing amendments. Citizens don't need the government's permission to petition for a change in the law. That right

---

(Continued from previous page)

entitled to absolute immunity). When they act administratively, however, they are only entitled to qualified immunity. *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 577-78, 580 (9th Cir. 1984). By suggesting that it's all the same ball of wax, we would not only deny a distinction we have held relevant in prior cases, but also undermine the absolute immunity heretofore enjoyed by local government officials acting in a legislative capacity.

[3] Perhaps the per curiam opinion is suggesting that only one request for amendment is required. But what's the principled basis for stopping there? Having once failed to persuade a legislative body to adopt a desired amendment, a landowner will still be faced with the possibility that the next attempt will be successful. When is enough, enough?

is already guaranteed by the Constitution. *See* U.S. Const., Amend. I.

Nor does the "requirement" that the TRPA act within 180 days provide anything of substance. For one thing, it is entirely hortatory; a political body cannot bind itself to take political action within a specific time frame. Failure to act within 180 days is plainly not judicially reviewable. Thus, the characterization of the statute as "an effective means of submitting a specific course of conduct to TRPA and forcing TRPA to act," per curiam op at 1337, sounds reassuring, but what does it mean? Although the per curiam opinion talks confidently about how landowners are given a means of "forcing the TRPA to act," it does not explain just how landowners would go about doing such forcing if the TRPA chose not to act.

In any event, I don't see how the 180-day requirement distinguishes this case from *Hall* and *Herrington*. That the TRPA has given some assurance that it will consider and dispose of amendment requests promptly makes it no more likely that it will act on them favorably. Absent a guarantee that amendments proposed via this special procedure are to be given substantively favored treatment, there is no distinction whatever between amendments proposed according to this procedure and those considered under the more traditional rough-and-tumble processes employed by most legislative bodies.

The per curiam opinion thus would allow procedure to triumph over substance: By providing a meaningless mechanism for petitioning or legislative change, the TRPA would be able to delay or even preclude substantive judicial review of plaintiffs' constitutional claim. We

should probably pause to consider what other constitutional claims can thus be shunted away from the courts and into the political arena, and for how long.

The rejoinder that life is more important than property, per curiam op at 1338 n. 5, obscures the fact that both are protected by the Bill of Rights and for that reason alone deserve solicitude – rather than thinly disguised contempt – from members of the judiciary. The fact is, the Constitution protects a variety of rights and liberties and reasonable minds might differ as to the relative importance of each. When we relegate certain of these to collateral status by refusing to give them the full measure of constitutional protection, we undermine the integrity of the constitutional structure and hand a potent weapon to those who may not share our vision as to which rights trump which.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

The TAHOE-SIERRA PRESERVATION COUNCIL, INC., a California non-profit corporation and membership organization, et al.,

Plaintiffs,

v.

The TAHOE REGIONAL PLANNING AGENCY, a separate legal entity created pursuant to an interstate Compact between the States of California and Nevada, et al.,

Defendants.

_____/

CV-R-84-257-ECR

ORDER

[Entered May 10, 1985]

Lake Tahoe, a unique high Sierra mountain lake and the dominant natural feature of the Tahoe basin, is losing its most valued quality, its pristine clarity. In recognition of this deterioration, the states of Nevada and California and the United States Congress ratified the Tahoe Regional Planning Compact (hereinafter Compact). The Compact is designed to protect, preserve, and enhance the Lake Tahoe Basin. *See* Tahoe Regional Planning Compact, Pub.L. 91-148, 83 Stat. 360, amended 1980 Pub.L 96-551, 94 Stat. 3233, NRS 277.200, West's Ann.Cal.Gov. Code, § 66801. In order to protect the natural beauty and economic productivity of the region, the Compact establishes a single agency, the Tahoe Regional Planning

Agency (hereinafter TRPA), to coordinate and regulate development and use of properties in the Tahoe basin. Pursuant to its mandate under the Compact, TRPA adopted a regional plan which includes among other sections, a section dealing with land-use protection and development.[1]

Following the adoption of the 1984 Regional Plan, plaintiffs, the Tahoe-Sierra Preservation Council and 364 named individuals (hereinafter Council),[2] brought suit against TRPA, the members of TRPA, and the states of Nevada and California.

The gravamen of the particular claims of Council's complaint is that TRPA's regional plan, adopted April 26, 1984, through ordinances, regulations, and prohibitions, deprives them of their property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.[3] The theories relied upon by council and the relief sought in its Complaint is as follows:

First Claim for Relief

> Alleges that in violation of the Fifth and Fourteenth Amendments of the Constitution, the Regional Plan precludes SEZ-plaintiffs[4] from making any reasonable or practical use of their property. Council seeks injunctive relief to prohibit TRPA from enforcing the provisions of the Regional Plan.

Second Claim for Relief

> Alleges that the provisions of the Regional Plan constitute a taking of SEZ property under the Fifth and Fourteenth Amendments of the Constitution. Council seeks just compensation.

Third Claim for Relief

Allegations and relief same as First Claim for Relief except applied to Class 1, 2, 3 plaintiffs.[5]

Fourth Claim for Relief

Alleges that the Regional Plan's restrictions deny Class 1, 2, 3 plaintiffs equal protection. Council seeks injunctive relief.

Fifth Claim for Relief

Allegations and relief same as the Second Claim for Relief except applied to Class 1, 2, 3 plaintiffs.

Sixth Claim for Relief

Alleges that the provisions of the Regional Plan constitute a taking of plaintiffs' benefits of utility services and assessment payments. Council seeks just compensation.

Seventh Claim for Relief

Alleges that TRPA inversely condemned plaintiffs' property under 42 U.S.C. § 1983. Council seeks injunctive relief against TRPA and monetary damages from all defendants.

California, Nevada, and TRPA move this Court to dismiss Council's complaint pursuant to Fed.R.Civ.P. 12(b) (6). The motions to dismiss attack the complaint for its purported failure to state a claim upon which relief can be granted. In support of its motion to dismiss, Nevada argues that: (1) the complaint is time barred; (2) the Eleventh Amendment bars any claims for damages; (3) Nevada cannot be held liable for assessments made by other government entities; and (4) when preventing harm

to the environment, greater restrictions than normal are available to a regulating agency.

California argues in support of its motion that: (1) the Eleventh Amendment bars any claims for damages; (2) the complaint is time barred; (3) Council has failed to exhaust administrative remedies; (4) California is not liable for any alleged TRPA actions; (5) TRPA need not comply with due process; (6) TRPA's Regional Plan complies with substantive due process; (7) TRPA's restrictions do not violate equal protection; and (8) there has been no unconstitutional taking of plaintiffs' properties.

Finally, TRPA argues: (1) TRPA members[6] are immune from suit; (2) Council fails to present a concrete controversy and has failed to exhaust administrative remedies; (3) damages for inverse condemnation are not cognizable against TRPA; (4) the Regional Plan is a valid exercise of power; (5) Council erroneously subdivided the components of plaintiffs' property rights; (6) the facts of this case do not support monetary damages under 42 U.S.C. § 1983; (7) the entire complaint is time barred; (8) plaintiffs were not denied due process; and (9) TRPA did not act in excess of its authority.

In support of several issues, defendants rely upon certain matters extrinsic to their motions to dismiss. Those issues will be treated as motions for summary judgement pursuant to Fed.R.Civ.P. 56.[7] This order, therefore, will only address: (1) whether damages for inverse condemnation are cognizable against TRPA, and; (3) whether Council's argument that deprivation of utility benefits and assessments paid state a claim for which relief may be granted.

For the purpose of the motions to dismiss, this Court must accept as established the well pleaded facts of the complaint. *See Collins v. Hardyman,* 341 U.S. 651, 652 (1951). We must deny the motions unless it can be said that plaintiffs can prove no set of facts in support of their claims. *See Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). With this standard in mind, we turn to the issues presented.

I. *Does the Eleventh Amendment bar Council's money claims against Nevada and California*

Both Nevada and California base their motions to dismiss in part on an argument that they are immune from a suit for monetary damages because of the Eleventh Amendment. Council counters with an allegation that both Nevada and California have waived their sovereign immunity to be sued in federal court over all matters arising from TRPA actions.

The Eleventh Amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

U.S. Const. Amend. XI. Absent a state waiver, the Eleventh Amendment protects states from suits brought in federal courts by her own citizens as well as by citizens of another state. *Edelman v. Jordan,* 415 U.S. 651, 663 (1974); *Hans v. Louisiana,* 134 U.S. 1, 10 (1890).

Nevada has not waived its eleventh amendment immunity. *See* NRS 41.031 (3);[8] *O'Connor v. Nevada,* 686

F.2d 749, 750 (9th Cir. 1982), *cert. denied* 459 U.S. 1071 (1982). Similarly, California has not generally waived its immunity. *See Yuan Jen Cuk v. Lackner*, 448 F.Supp. 4, 8 (N.D. Calif. 1977) (three-judge court). Thus, Nevada and California are generally protected from money judgments by the Eleventh Amendment. *See Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 464 (1945).

Council argues that even though states are generally immune from suit under the Eleventh Amendment, California and Nevada have waived their sovereign immunity. In support of its waiver argument, Council asserts that the recent 1980 amendments to the TRPA Compact waived any Eleventh Amendment immunity Nevada and California may have enjoyed.[9] Nevada and California assert that neither state waived their sovereign immunity for actions arising from TRPA, nor was there any intent to do so.

A sovereign's immunity may be waived and a state may consent to suit against it in federal court. *See Pennhurst State School & Hospital v. Halderman*, 104 S.Ct. 900, 907 (1984). That consent, however, must be unequivocally expressed. *Id.*[10] The state's immunity stems from a solemn recognition of the vital role that the doctrine of sovereign immunity plays in our federal system. *Id.* In evaluating whether a waiver has been made by a state, this Court is guided by the standard enunciated in *Edelman v. Jordan*: "In deciding whether a State has waived its constitutional protection under the Eleventh amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " *Edelman*, 415 U.S. at 673. (citation

omitted). Thus, it is with this standard in mind that we examine the TRPA Compact to determine whether there is an unequivocal waiver of immunity.

The compact was amended in 1980. Council argues that those amendments regarding all substantive provisions of the Compact demonstrates an express waiver of any Eleventh Amendment claim for immunity. Council places heavy emphasis on the key role California and Nevada play in TRPA.

Specifically, Council points to Article VI(j) of the Compact to support its waiver argument. Council's reliance on an article which merely establishes subject matter jurisdiction, venue, statute of limitations, and standard of review principles for litigation brought under the Compact is misplaced. Council fails to address the fact that there is no express waiver of the states' immunity in Article VI(j).[11] Despite the Supreme Court's clear mandate that all Eleventh Amendment waivers be expressed unequivocally, Council urges this Court to *infer* a waiver based upon the states' intrinsic involvement in the Compact and the Compact's provisions for litigation. This Court declines to do so. While it may be true that Nevada and California expanded their roles and involvement in TRPA by the 1980 amendments, this involvement does not constitute an equivocal waiver.

Finally, relying on *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), Council further attempts to support its waiver argument. Council points to language the *Petty* court found to be a waiver and urges this Court to similarly find the language in the Compact a waiver. The Ninth Circuit specifically addressed and rejected this

argument in *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1361-1362 (1977) *aff'd in part, rev'd in part on other grounds sub nom Lake Country Estates v. TRPA*, 440 U.S. 391 (1979).

In *Petty*, the Court relied upon express provisos added by Congress, which when read in conjunction with the sue and be sued clause in the Compact, reserved the jurisdiction of the federal courts in matters arising from the Compact. *Petty*, 359 U.S. at 281-282. There was no express proviso attached by Congress when it approved the 1980 amendments to the TRPA Compact. *See* Pub.L. 96-551. As the Ninth Circuit points out, absent such a proviso, the immunity waiver must be found in the compact itself. *Jacobson*, 566 F.2d at 1362. The 1980 amendments relied upon by Council do not support a different result from *Jacobson*. In *Jacobson*, the Ninth Circuit found that, at best, the provision for bringing suit in either state or federal court was ambiguous and thus insufficient to constitute a waiver of immunity.[12] The current provision is similarly ambiguous. The Compact now provides that legal actions arising out of or alleging a violation of the provisions of the Compact may be filed in the appropriate courts of California and Nevada and of the United States. *See* Article VI(j)(1). As with the reference to actions brought in the federal court of the original compact (Article VI(b)), the reference to a suit being filed in an appropriate court of the United States is admittedly ambiguous. Nevertheless, when read in conjunction with Article III(a) which continues to provide that the TRPA is separate legal entity, this Court finds no waiver of immunity. *See Jacobson*, 566 F.2d at 1362. There has been no clear

expression of congressional intent to abrogate the immunity granted and no clear expression of the states' consent to the abrogation. Such expression must be evidenced before this Court may find a waiver. *See Edelman v. Jordan*, 415 U.S. at 673; *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1173 n.5 (9th Cir. 1984). The 1980 Amendments to the Compact do not change the result of *Jacobson*. California and Nevada do not waive their eleventh amendment immunity.

Thus, Nevada's and California's motions to dismiss will be granted for the monetary damages sought by Council in the Second and Fifth Claims for Relief.

Relying on the Eleventh Amendment, Nevada and California also move this Court to dismiss Council's claim under 42 U.S.C. § 1983. An action for inverse condemnation is cognizable under the federal civil rights statute. *See MacLeod v. County of Santa Clara*, 749 F.2d 541, 544 (9th Cir. 1984). However, even though Council states a cognizable claim under § 1983, the eleventh amendment immunizes Nevada and California and the claim must be dismissed.

As the Ninth Circuit holds in *Windward Partners v. Ariyoshi*, 693 F.2d 928, 929 (9th Cir. 1982):

> "The framing of plaintiff's claims as a § 1983 action does not change our conclusion. In *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed. 2d 358 (1979), the Supreme Court held that section 1983 does not abrogate or 'override' the sovereign immunity of the states under the eleventh amendment."

Thus, Nevada's and California's motions to dismiss Council's Seventh Claim for Relief are granted.

II. *May TRPA be sued for money damages based upon inverse condemnation*

TRPA moves to dismiss Council's Second and Fifth Claims for Relief based on the argument that damages for inverse condemnation do not lie against TRPA.[13] TRPA argues that monetary damages are not available from an entity which lacks condemnation authority. The thrust of TRPA's argument relies upon the Ninth Circuit opinion, *Jacobson*, 566 F.2d 1353. The Ninth Circuit, in addressing a claim for damages holds:

> "[A] cause of action for inverse condemnation under the just compensation clause cannot be stated against the TRPA, its executive director or members of its governing board because they lack condemnation authority."

Id. at 1358 (footnote omitted). Although on appeal this issue was not before the Supreme Court, that Court did state:

> "The District court dismissed the complaint. Although it concluded that the complaint sufficiently alleged a cause of action for 'inverse condemnation,' it held that such an action could not be brought against TRPA because that agency did not have the authority to condemn property."

Lake Country Estates, 440 U.S. at 395-396 (footnote omitted). The Supreme Court did not express any disapproval of the district court's holding or of the Ninth Circuit's affirmation.

Council, however, urges this Court to reject this holding on the basis of its "questionable precedential value."

Council asserts that money damages are appropriate relief for regulations which result in a taking.

The determination of appropriate relief for regulations which amount to a taking has not been settled under federal law.[14] Council cites Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), in support of its argument that the *Jacobson* holding has been eclipsed. The Brennan dissent reached the merits of a case which the majority held to be unappealable because there was no final order. Justice Rehnquist did appear to give a majority vote by agreeing with Justice Brennan that:

> "[O]nce a court establishes that there was a regulatory 'taking,' the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation."

Id. at 653. This Circuit has similarly interpreted this as the view of the Supreme Court. *See Martino v. Santa Clara Valley Water District*, 703 F.2d 1141 (9th Cir.), *cert. denied*, 104 S.Ct. 80 (1984). Justice Brennan's language is unequivocal and would demand monetary damages once a finding is made that a taking has occurred. However, Justice Brennan was not faced with a governmental entity lacking condemnation authority. Thus, *Jacobson* remains the law for damage claims against TRPA.

This Court is persuaded in part by Council's arguments. However, we are unable to disregard the law of this Circuit as we have found it to be. Thus, TRPA's motions to dismiss Council's Second and Fifth Claims for

Relief, which attacks the zoning ordinances as a deprivation of civil rights under 42 U.S.C. § 1983 is also dismissed as to money damages. *Jacobson v. Tahoe Regional Planning Agency*, 474 F.Supp. 901, 903-904 (D. Nev. 1979) *aff'd* 661 F.2d 940 (9th Cir. 1981).

III. *Does relief lie for compensation of utility assessments and expected benefit of utilities*

All defendants move this Court to dismiss Council's Sixth Claim for Relief. Council's sixth claim asserts that recovery is available for assessments made against the property owners for construction of utility improvements and the owners' expectation to receive the benefits of those utilities. Council seeks monetary damages and equitable relief.

Nevada, California, and TRPA argue that *Furey v. City of Sacramento*, 592 F.Supp. 463 (E.D. Calif. 1984), should guide this Court to dismiss Council's Sixth Claim for Relief.[15] In his well-reasoned opinion, Judge Ramirez rejects the contention that an additional taking occurs when the components of property rights are subdivided in an attempt to gain recovery. *Id.* at 472. Relying upon *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), Judge Ramirez found that a single parcel may not be divided into discrete segments in order to allege that one component of the parcel has been taken. This Court adopts the reasoning of Judge Ramirez in *Furey*.

Council's attempt to distinguish its claim from that claim dismissed in *Furey* merely serves to underline the similarities. Council argues that the thrust of its Sixth Claim for Relief is " . . . merely to restate the cause of

action for inverse condemnation of Plaintiff's entire properties, with special emphasis on taking of (1) Plaintiffs' expectation to receive the benefits of the utility services and (2) Plaintiffs' assessment payments. The latter two are clearly 'sticks' in the 'bundle of rights' comprising Plaintiffs' property." Council's Opposition at 102. Council's attempt to challenge TRPA's zoning ordinances by severing two of its "sticks" fails to state a separate claim for which relief can be granted.

This Court finds that the analysis in *Furey* is correct and Council's claim merely an attempt to subdivide the property rights of plaintiffs. Therefore, defendants' motions to dismiss Council's Sixth Claim for Relief will be granted.

IV. Conclusion

IT IS, THEREFORE, HEREBY ORDERED for the reasons stated above, that:

(1) Nevada's motions to dismiss the Second, Fifth, Sixth, and Seventh Claims for Relief are GRANTED:

(2) California's motions to dismiss the Second, Fifth, Sixth, and Seventh Claims for Relief are GRANTED;

(3) TRPA's motions to dismiss the Second, Fifth, and Sixth Claims for Relief are GRANTED, and

(4) TRPA's motion to dismiss the Seventh Claim for Relief of money damages is GRANTED.

IT IS FURTHER ORDERED that the remaining issues in defendants' motions to dismiss shall be treated as motions for summary judgment in accordance with

Fed.R.Civ.P. 12(b), 56. Defendants shall have 30 days within which to supplement said motions as motions for summary judgment. Plaintiffs shall thereafter have 30 days within which to respond to said motions as motions for summary judgment, and defendants shall thereafter have 15 days within which to file a reply.

DATED: May 10, 1985.

/s/ Edward C. Reed
UNITED STATES DISTRICT JUDGE

Footnotes

---

[1] The Compact imposes significant duties on the TRPA regarding the adoption of the regional plan. For example, the TRPA must first adopt "environmental threshold carrying capacities for the region" and within one year of this adoption, must amend the regional plan while achieving and maintaining these capacities. Compact, Art. V(b).

[2] The named individuals allegedly own one or more parcels of real property located in the Tahoe Basin subject to the regulations of the Regional Plan.

[3] This Court notes that in contrast to Council's position, the State of California has sued the TRPA alleging that the TRPA's efforts to protect environmentally sensitive land has been inadequate. *See* California Motion to Dismiss at 5.

[4] SEZ-plaintiffs are those landowners of property which has been classified by the Regional Plan as "Stream Environment Zone."

[5] Class 1, 2, 3 plaintiffs are those landowners of property whose land capability has been classified in the Regional Plan as Class 1, 2, 3.

[6] Council has also named individual TRPA members in its complaint. The TRPA bases its argument to dismiss the individual board members on Supreme Court's holding that the TRPA members are immune from damages when they are acting in a legislative capacity. *See Lake Country Estates*, 440 U.S. 391, 406 (1979). This Court, however, is unable to determine from the record before us whether the TRPA members are being sued for performance of their legislative duties. Therefore, as noted in the order, this Court converts this motion to summary judgment.

[7] Council objects to any reliance on those extrinsic matters without a conversion to motions for summary judgment. However, Council's admission that it has knowledge that matters outside the pleadings have been submitted constitutes notice in this Circuit and this Court is under no obligation to provide additional notice to Council that remaining issues could be transformed to motions for summary judgment. *See Grove, Riddle, and Riddle v. Mead School; District*, No. 83-3784 at 7 (9th Cir. amended April 15, 1985); *Garaux v. Pulley*, 739 F.2d 437, 439-440 (9th Cir. 1984).

[8] NRS 41.031(3) provides:

"The State of Nevada does not waive its immunity from suit conferred by Amendment XI of the Constitution of the United States."

[9] Council also argues that the Supreme Court's examination of TRPA's lack of Eleventh Amendment immunity should guide this Court to find California and Nevada have waived their immunity. *See Lake Country Estates, Inc., v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). This Court finds this argument meritless. In *Lake Country*, the Supreme Court decided whether TRPA was entitled to the "immunity that the *Eleventh Amendment provides to the compacting states themselves.*" *Id.* at 393. (emphasis added) (footnote omitted). Thus, not only did the Court implicitly recognize that California and Nevada enjoyed Eleventh Amendment immunity, but the analysis of the Court was whether the Eleventh Amendment should be extended beyond the compacting states (California and Nevada) to TRPA. The Court, in declining to expand the states' immunity to TRPA, found that it was not an arm of the state

and there was no intention to confer immunity on TRPA. *Id.* at 402. The *Lake Country* Court specifically noted that it was not addressing whether or not there was any affirmative waiver of Eleventh Amendment immunity by the compacting states. *Id.* at 402, n.23.

[10] This Court could find abrogation of a state's Eleventh Amendment immunity if an unequivocal expression of congressional intent to "overturn the constitutionally guaranteed immunity of the several states" is demonstrated. *Pennhurst*, 104 S.Ct. at 907 *quoting Quern v. Jordan*, 440 U.S. 332 (1979). However, even Council does not argue that Congress intended to abrogate California and Nevada's sovereign immunity regarding the TRPA Compact.

[11] Article VIII(e) of the Compact provides that no TRPA obligation shall bind either of the party states. This appears to negate any inference Council makes that Nevada and California intended to subject the states to liability for TRPA actions.

[12] Article VI(b) of the original Compact commanded that suit should be brought in a court of the state where a violation of the Compact was committed or where the property was located "unless the action is brought in a federal court."

[13] Nevada also asserts the Eleventh Amendment as a bar to the damages claims against TRPA. Nevada argues that any damages TRPA would be liable for would be paid by the treasuries of the compacting states and, therefore, the Eleventh Amendment bars any money claims against TRPA as it would be against the states. Some support for Nevada's argument can be found in *Pennhurst*, 104 S.Ct. 900. There, the Supreme Court holds "[t]he general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, . . . " *Id.* at 908, n.11 citing *Dugan v. Rank*, 372 U.S. 609, 620 (1963). Despite this recent pronouncement, this Court must rely on the clear mandate of the Supreme Court that the Eleventh Amendment is not a bar to damages claims asserted against TRPA and, thus, rejects Nevada's argument. *Lake Country Estates*, 440 U.S. 391.

[14] On the other hand, the California Supreme Court has made it clear that the appropriate remedy under state law for an unconstitutional regulation that operates as a taking is

mandamus or declaratory relief rather than inverse condemnation resulting in monetary damages. *Agins v. City of Tiburon*, 24 Cal. 3d 266, 275-77 (1979), *aff'd.* 447 U.S. 255, 100 S.Ct. 2138 (1980).

[15] Nevada and California also argue that the Eleventh Amendment bars any damages based on Council's Sixth Claim for Relief. This Court, for the reasons stated in part I, of this Order, agrees that the Eleventh Amendment is an alternative ground for dismissing Council's Sixth Claim for Relief against Nevada and California.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

The TAHOE-SIERRA PRESERVATION COUNCIL, INC., a California non-profit corporation and membership organization, et al.,

Plaintiffs,

v.

The TAHOE REGIONAL PLANNING AGENCY, a separate legal entity created pursuant to an interstate Compact between the States of California and Nevada, et al.,

Defendants.

_____/

CV-R-84-257-ECR

ORDER

[Entered June 6, 1986]

This Court by order dated May 10, 1985,[1] granted defendants' motions to dismiss the second, fifth, sixth, and seventh[2] causes of action. We converted the remaining issues presented by defendants to summary judgment pursuant to Fed.R.Civ.P. 56 and allowed further briefing.[3] Oral hearing on the motions for summary judgment was held on March 31, 1986.

This case involves a challenge to the 1984 Regional Plan adopted by defendant Tahoe Regional Planning Agency (TRPA). Regional planning in the Lake Tahoe Basin is inherently difficult. The Basin is 500 square miles (192 square miles covered by Lake Tahoe) and covers two states and five counties. The area, because of population

and topography, presents difficult environmental problems. In recognition of this, the states of Nevada and California sought to coordinate the planning effort at the Lake. In 1969 the two states adopted an interstate agreement, the Tahoe Regional Planning Compact (Compact), which was approved by Congress. Pub.L. No. 91-148, 83 Stat. 360 (1969); *amended* Pub.L. 96-551, 94 Stat. 3233; Calif. Govt. Code Sections 66800 and 66801; NRS §§ 277.190 and 277.200. Nevada and California extensively amended in the Compact in 1980 in recognition that "[t]he waters of Lake Tahoe and other resources of the region are threatened with deterioration or degeneration, which endangers the natural beauty and economic productivity of the region." Article I, Compact.

The 1980 amendments imposed several new and specific mandates on the TRPA. The TRPA must first adopt "environmental threshold carrying capacities for the region." Article V(b). Within one year after adoption of the environmental thresholds, the TRPA was mandated to amend the regional plan so that, at a minimum, the environmental threshold carrying capacities would be implemented. Article V(c). It is the Regional Plan, which the TRPA enacted April 26, 1984, which is the subject of this lawsuit.

Plaintiffs are the Tahoe-Sierra Preservation Council (Council) and several hundred of its members owning legally-created lots or parcels within the Lake Tahoe region, which are classified by the TRPA's Regional Plan as either Stream Environment Zone (SEZ) or land capability class 1, 2 or 3. Further allegations regarding each plaintiff's lot or parcel are set forth in appendices to the complaint.

"The gravamen of Council's complaint is that, as a result of the excessive restrictions or 'overregulations' of Council's properties imposed by provisions of the 1984 Regional Plan, defendants have 'taken' Council's properties in violation of the Fifth Amendment proscriptions against deprivation of property without due process of law and taking of property for public use without payment of just compensation." Plaintiffs' Opposition to Motions for Summary Judgment at 4-5 (document #64).

The following claims for relief are still before this Court:

> First Claim for Relief: Alleges that the Regional Plan precludes SEZ-plaintiffs from making any reasonable or practical use of their property.
>
> Third Claim for Relief: Alleges that the Regional Plan precludes Class 1, 2, 3 plaintiffs from making any reasonable or practical use of their property.
>
> Fourth Claim for Relief: Alleges that the Regional Plan's restrictions deny Class 1, 2, 3 plaintiffs equal protection.
>
> Seventh Claim for Relief: Alleges that the TRPA inversely condemned plaintiffs' property in violation of 42 U.S.C. § 1983.

Although all defendants join in each other's motions, the following specific arguments are made by the parties. The TRPA argues in support of its motion that: (1) the members of the TRPA governing body are immune from any suit because they acted in their legislative capacity; (2) the Council failed to exhaust administrative remedies in that it is not "aggrieved" within the meaning of Article VI(j); (3) as a matter of law, the TRPA's amended Regional

Plan and implementing ordinance are valid exercises of its police power; (4) Council has not been denied procedural due process of law; and (5) the TRPA did not act in excess of its authority.

Nevada argues in support of its motion that: (1) Council's complaint is barred by the Compact's statute of limitations; (2) Council's property has not been taken without due process of law in that the TRPA's Regional Plan and its restrictions are related to legitimate state interests; (3) the Regional Plan serves legitimate environmental objectives and satisfies the Compact's mandate; and (4) the Regional Plan is facially valid and does not unconstitutionally take any property.

California argues in support of its motion that: (1) Council fails to demonstrate an uncompensated taking in violation of the Constitution; (2) the Regional Plan does not violate any procedural or substantive due process; (3) California constitutionally delegated its power to TRPA; (4) the different restrictions for environmentally sensitive land does not violate Council's equal protection rights; and (5) there has been no taking of Council's land without compensation.

REVIEW

Council contends for the first time that this Court may not grant the motions for summary judgment[4] because the necessary determinations may only be made after an *ad hoc* factual inquiry. The TRPA argues that because Council challenges the Regional Plan "on its face" that such "*ad hoc*" factual inquiry is not mandated,

and furthermore that the disposition of a case by summary judgment does allow the factual inquiry that Council asserts is required. The Court finds that the record before us is sufficient and do not find that an *ad hoc* factual inquiry is mandated.

IS THE ENTIRE COMPLAINT BARRED BY THE COMPACT'S STATUTE OF LIMITATIONS

As a preliminary issue, this Court must pass on the claim of defendants that the complaint is barred by the Compact's statute of limitations. The defendants argue that pursuant to Article VI(j) (4) of the Compact, the Council's complaint is time-barred. Council argues that a sixty-day limitation challenge is inappropriate for a constitutional challenge.

The Compact provides that any legal action arising out of the adoption or amendment of the Regional Plan or of any ordinance or regulation must be commenced 60 days after final agency action or 65 days after discovery of injury. Article VI(j) (4). Although the defendants contend that the agency action which provides the basis for Council's suit is the 1982 threshold adoptions by the TRPA, the gravamen of Council's complaint is that the 1984 Regional Plan unconstitutionally deprives Council of several rights. All the parties agreed that the complaint was filed within sixty days of adoption of the Regional Plan. Thus, no issue is before the Court as to whether or not the sixty-day limitation is appropriate for a constitutional challenge.

IS THE TRPA IMMUNE FROM ALL CLAIMS FOR RELIEF BASED UPON THEIR LEGISLATIVE IMMUNITY

The TRPA argues that adoption of a comprehensive land use plan, such as the Regional Plan at issue here, is a legislative act and thus, cloaks the TRPA members with legislative immunity. The TRPA members argue that any time an entity enacts land use restrictions, that entity acts in a legislative capacity. Council does not really dispute this. Rather, Council asserts that it seeks injunctive relief from the enforcement of the Regional Plan. Council contends that it is not suing the TRPA members in their legislative capacity but rather in their enforcement capacity, and, therefore, the members have no immunity.

In our previous order, this Court noted that we were unable to determine from the record before us whether the TRPA members were being sued for performance of their legislative duties. 611 F.Supp. at 113 n.6. The question presented to the Court appears to be whether the Council seeks relief from the TRPA's enactment of the land use ordinances or whether the Council seeks relief from the enforcement of the ordinances.

Both parties rely on *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980), for their respective positions. In *Virginia*, a § 1983 suit was brought against the Supreme Court of Virginia and its Chief Justice challenging the Court's disciplinary rules governing the conduct of attorneys. The Virginia defendants claimed both legislative and judicial immunity. The Supreme Court distinguished between the judges' legislative, adjudicative, and enforcement functions. It held that although the state court and its Chief Justice were immune for the

promulgation of the State Bar Code, which was a legislative function, *id.* at 731-34, they were proper defendants in a suit for declaratory and injunctive relief as to their role in the institution and enforcement of disciplinary proceedings. *Id.* at 736-37.

In this case, defendant members of the TRPA do stand in the same shoes as the judges as far as the implementation of the Regional Plan is concerned. Just as the judges enforced the rules governing the conduct of attorneys, so do the members of the TRPA enforce the Regional Plan. Accordingly, summary judgment is inappropriate on this issue.

HAS THE COUNCIL FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES

The TRPA argues that in order to bring suit challenging the constitutionality of the Regional Plan, a party must be "aggrieved" as that term is defined by the Compact.[5] The TRPA goes on to argue that because Council is not aggrieved, Council has failed to exhaust its administrative remedies. Council asserts that because it challenges the Regional Plan on its face, there is no requirement that it exhaust any administrative remedies provided to it by the Compact. Furthermore, Council notes that its seventh claim for relief is based upon 42 U.S.C. § 1983.

As the Ninth Circuit recently noted:

> *"In Williamson County Regional Planning Comm'n v. Hamilton Bank,* 105 S.Ct. 2108 (1985) the Supreme Court dismissed for lack of ripeness a bank's claim that county zoning regulations had effected a taking of its property in violation of

> the fifth amendment. The opinion advanced two alternative grounds for the result. First, because the respondent bank had not applied for variances that might have allowed greater development of its property, the government entity charged with implementing the regulations had not been given the chance to reach a final decision regarding the application of the regulations to the property at issue. This circumstance precluded the court from determining whether 'the economic impact of [the zoning laws] and the extent to which [they] interfer[ed] with reasonable investment-backed expectations' justified a finding of a taking. *Id.* at 3119. Second, the bank had not sought compensation through the procedures the stat_ provided for doing so. As a consequence, it could not claim that its property had been taken without just compensation. *See id.* at 3121."

Furey v. City of Sacramento, 780 F.2d 1448, 1450 n.1 (9th Cir. 1986).

Plaintiffs in a § 1983 action are not required to exhaust administrative remedies. *See Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982). In *Williamson*, the Supreme Court distinguished *Patsy* by finding that exhaustion of administrative remedies "is conceptually distinct, . . . from the question of whether an administrative action must be final before it is judicially reviewable." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 105 S.Ct. 3108, 3120 (1985). The Court stated that:

> ". . . the finality requirement is concerned with whether the initial decision-maker has arrived as a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured

> party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate."

Id. The Court distinguished exhaustion of administrative remedies from the finality issue. The Court explained that:

> "[t]he difference is best illustrated by comparing the procedure for seeking a variance with the procedures that, under *Patsy*, respondent would not be required to exhaust. While it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by authorities, . . . [citations omitted], respondent would not be required to resort to those procedures before bringing its 1983 action, because those procedures are clearly remedial. Similarly, [the Bank] would not be required to appeal the Commission's rejection of the preliminary plat to the Board of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decision-making."

Id. at 3120.

In *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981), the Supreme Court rejected a taking clause challenge to the Surface Mining Control and Reclamation Act of 1977. The Court noted that plaintiffs' attack did not identify any particular property that had been taken. The Court pointed out that the "*ad hoc* factual inquiries" in which courts must engage in determining whether an exercise of the police power is confiscatory "must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate

valuation relevant in the unique circumstances." *Id.* at 295.

The Supreme Court's pronouncement would seem to support the TRPA's argument. Council has not presented its claims directly to the TRPA before proceeding in this Court. The requirement that it seek relief from the TRPA before coming into this Court would support dismissing this complaint as being premature. The defendants also point out various procedures which the plaintiff property owners may rely upon for relief. Those procedures are found in the Regional Plan.

The Regional Plan utilizes the Bailey Land Capability System which divides all the lands in the Lake Tahoe Basin into seven categories. Class 1 lands are those that have the "highest theoretical risk of run-off or erosion" while Class 7 lands have the least theoretical risk. *See* Land-Capability Classification of the Lake Tahoe Basin, California-Nevada, a Guide for Planning, Robert G. Bailey 1974. The concept of the Land Capability System incorporated in TRPA's 1984 Regional Plan represents a significant factor in determining development in the Lake Tahoe Basin. Additionally, the TRPA identified and mapped certain areas of land known as Stream Environment Zones as part of its 1978 Water Quality Management Plan. Development in Class 1, 2, 3 and SEZ lands are curtailed because of the tremendous harm to the environment if development were automatically allowed.

One of the options available is that the Regional Plan provides for 75 permits for single family dwellings to be obtained by owners of Class 1, 2, or 3 land annually for three years beginning in 1986. *See* Regional Plan IV-13.

The Council admitted at the hearing that none of the class 1, 2, 3, plaintiffs had sought a permit or been rejected for one prior to the filing of this lawsuit. In addition, public outdoor recreation facilities are permitted in land capability districts 1, 2, 3 if certain conditions are met. *Id.* at IV-14.

The Regional Plan also requires the TRPA to review and update its land capability map "to accurately reflect the land capability levels of all areas in the region." *Id.* at IV-15. This permits land owners to challenge a land capability classification. This means that some plaintiffs may be reclassified to a less regulated land classification.

Another option open to Council which has not yet been explored is transfer development rights.[6] *Id.* at VII-10-11. Council argues that this is not a viable option because although contemplated by the Regional Plan, the TRPA has failed to implement any transfer development program. At the hearing, the TRPA argued that the ordinances are almost complete and that the Compact clearly mandates implementing ordinances.

Plaintiffs holding land in stream environment zones face stringent regulations. The SEZ land is the most environmentally sensitive and with certain limited exceptions, no new development will occur on this land. *Id.* at IV-25, 26. SEZ land may, however, be modified and if done in such a way that the area no longer exhibits the characteristics of SEZ, new development may be allowed. *Id.* As with Class 1, 2, 3 land, SEZ land is subject to land capability challenges for reclassification.

Council admitted at oral argument that none of the options arguably open to landowner plaintiffs have been

attempted. However, on the face of the Regional Plan, options do exist for development in the Lake Tahoe Basin.[7] Accordingly, under the Supreme Court's mandate in *Williamson*, Council's complaint is not yet ripe and summary judgment should be granted as to the seventh claim for relief.

ARE THE REGIONAL PLAN AND IMPLEMENTING ORDINANCES VALID AS A MATTER OF LAW AND AS AN EXERCISE OF THE TRPA'S LEGITIMATE POLICE POWER

Council alleges a denial of equal protection in the allowance of building public buildings, while prohibiting private building on environmentally sensitive land. However, the mere showing of some discrimination by the TRPA is not sufficient to demonstrate an invasion of Council's constitutional rights. As courts frequently recognize, most legislation in some regard discriminates between various classes of persons business enterprises, or other entities. However, absent a suspect classification or invasion of fundamental rights, equal protection rights are violated only where the classification does not bear a rational relationship to a legitimate state interest. *See Ybarra v. Los Altos Hills*, 503 F.2d 250, 254 (9th Cir. 1974).

There is no suspect classification at issue here. The Court finds that the Regional Plan's allowance of public buildings on environmentally sensitive land bears a rational relationship to the TRPA's legitimate recognition that a circumstance may arise in the future that a particular public building must be built in a particular area. Thus, defendants' motions for summary judgment as to Council's fourth claim for relief should be granted.

The final issue before this Court is whether the Regional Plan is a legitimate exercise of police power. Council's arguments urging this Court that a complete factual inquiry must be made to determine the wisdom of the Regional Plan is misplaced. We are without authority to second-guess the TRPA. If a legitimate state interest is furthered by the zoning regulations in the Regional Plan, we will uphold the TRPA's enactments at this juncture. *See Construction Indus. Ass'n of Sonoma County v. Petaluma*, 522 F.2d 897, 906 (9th Cir. 1975) *cert. denied* 424 U.S. 934 (1976).

It is true, however, that whether the TRPA's Regional Plan subjects parcels of land to different treatment in a way that fails to serve a legitimate governmental purpose is in part a factual question. The defendants have presented this Court with evidentiary material on this question. Plaintiffs affidavits do not contradict this material and, thus, there is no genuine issue of material fact which would preclude summary judgment.[8]

A zoning regulation is not made invalid merely because of loss of value to the property affected, even if that loss is substantial. *Zahn v. Board of Public Works*, 195 Ca. 497, 234 P. 388 (1925) *aff'd* 274 U.S. 325 (1927); *Consolidated Rock Products Co. v. Los Angeles*, 57 Cal.2d 515, 20 Cal.Rptr. 638, 370 P.2d 342 (1962); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *see also Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (zoning was approved even though it caused a reduction in value of over 90 percent). The exercise of police power must not be arbitrary, unreasonable, or capricious and must be substantially related to the public welfare. *See Moore v. East Cleveland*, 431 U.S. 494 (1977) (plurality opinion); *Village*

of Euclid v. Ambler Realty Co., 272 U.S. 365. A zoning ordinance or regulation is unconstitutional only if its provisions are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. at 395.

In determining whether the Regional Plan furthers legitimate state interests, we are not limited to a determination of whether the regulations apply only to noxious activities or dangerous structures. *Construction Indus. Ass'n of Sonoma County v. Petaluma*, 522 F.2d at 906.

> "As the Court stated in *Berman v. Parker*, 348 U.S. 26, 33, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954):
>
> > The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.
>
> (citations omitted). *Accord, Village of Belle Terre v. Boraas*, 416 U.S. 1, 6, 9, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974)."

Id.

The TRPA's interest in the preservation of Lake Tahoe is mandated by the 1980 amendments to the Compact. There is no disagreement between the parties that this interest is in the public welfare and is a legitimate state interest.

The Compact ordered the TRPA to establish environmental threshold carrying capacities and to adopt and

enforce a regional plan to achieve and maintain these capacities. The Compact evidences the concern and importance in protecting, preserving and enhancing the scenic, recreational, educational, scientific, natural and public health values provided by the Lake Tahoe Basin. California and Nevada delegated to the TRPA the police powers necessary to carry out their mandate.

Council fails to distinguish between the exercise of the police power and the power of eminent domain. The TRPA exercised its police power in enacting the plan and the orders necessary under the plan.

> "It is true the line between police power and condemnation has not been and perhaps cannot be sharply drawn. The problem is really one of degree. In both, damages may result but if the damage is such as to be suffered by many similarly situated and is in the nature of a restriction on the use to which land may be put and ought to be borne by the individual as a member of society for the good of the public safety, health or general welfare, it is said to be a reasonable exercise of the police power, but if the damage is so great to the individual that he ought not to bear it under contemporary standards, then courts are inclined to treat it as a "taking" of the property or an unreasonable exercise of the police power. [*Stefan Auto Body v. State Highway Com.*, 21 Wis. 2d 363, 369-70, 124 N.W.2d 319, 323 (1963)].
>
> While constructive takings, and not just actual takings, may be actionable under the fifth amendment where governmental regulation has imposed an excessive restriction on the use of land, a further distinction, articulated by Professor Freund in his well-known work, The

Police Power, 511, at 546-47 (1904), must be noted:

> It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful. . . . From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not.

As stated by the Court in *Just v. Marinette County*, 56 Wis. 2d 7, 16, 201 N.W.2d 761, 767, 3 ELR 20167, 20168 (1972):

> *Thus the necessity for monetary compensation for loss suffered to an owner by police power restriction arises when restrictions are placed on property in order to create a public benefit rather than to prevent a public harm.* [Emphasis added.]"

Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F.Supp. 1369, 1382 (D. Md. 1975). In this case, the TRPA's plan is aimed at preventing the public harm to Lake Tahoe. All environmental reports, and all of the parties agree, that Lake Tahoe is losing its clarity because of sediment washing into the water due to land erosion. Because we find that the TRPA plan is not an attempt at eminent domain, (which would be void because the TRPA does not have such authority), but rather an exercise of police power in order to prevent a public harm, Council is not entitled to injunctive relief.

Council also argues in support of its claim that its due process rights have been violated that the TRPA's failure to incorporate variance provisions in the Regional Plan's restrictions on development of high hazard, low

capability lands deprives them of their right to an individual notice and hearing.

In an exercise of the police power affecting only property rights, a zoning board is not required to prove that it adopted the least restrictive means of accomplishing a legitimate public purpose or that the means adopted is perfectly consistent with the desired result. *See Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) *reh'g denied* 349 U.S. 925. The board need only demonstrate that the means adopted bear a rational relation to the legitimate public purpose. *See e.g., Cowart v. Ocala*, 478 F.Supp. 774, 784 (D.C. Fla. 1979). On its face, the Regional Plan stands. Accordingly, the motions for summary judgment as to the remaining claims should be granted.

IT IS, THEREFORE, HEREBY ORDERED that the defendants' motions for summary judgment are GRANTED.

DATED: June 3, 1986.

s/ Edward C. Reed
UNITED STATES DISTRICT JUDGE

FOOTNOTES

---

[1] *The Tahoe-Sierra Preservation Council, Inc. v. The Tahoe Regional Planning Agency*, 611 F.Supp. 110 (D. Nev. 1985).

[2] Our previous order granted defendants' motion to dismiss the seventh claim for relief as far as it sought monetary damages. The remaining claim for injunctive relief remains.

[3] The briefs submitted by the parties have been extensive and found to be of the highest quality. The Court compliments all of the counsel.

[4] When opposing defendants' motions to dismiss, Council argued that the motions must be converted to motions for summary judgment. Council did not suggest that summary judgment would be improper.

[5] According to the Compact, an aggrieved person means "any person who has appeared, either in person through an authorized representative, or in writing, before the agency at an appropriate administrative hearing to register objection to the action which is being challenged, or who had good cause for not making such an appearance." Article VI(j) (3).

[6] Transfer development rights operate by allowing a landowner to receive density credits for development proposals in redirection areas or areas designated for transferring development potential from sensitive lands. Land coverage from sensitive lands may be transferred to tourist and multi-residential uses, commercial and public service uses, and regional public facilities, if coverage is available within the receiving watershed association and if coverage limits are not exceeded. Regional Plan, VII-10. Transfers are available from sensitive lands to more suitable sites and may also be transferred across jurisdictional boundaries. *Id.* at VII-11.

[7] Another option open to landowners of sensitive lots outside the scope of the Regional Plan are the buyout programs administered by the federal government. Burton-Santini Act, Pub.L. No. 95-586, 94 Stat. 3381 (1980), and the State of California, Lake Tahoe Acquisitions Bond Act, Cal.Gov.Code 66950 *et seq.* The focus of the federal program is acquisition of unimproved land classified SEZ and Class 1, 2, 3.

[8] Council offered affidavits of the following expert opinions: (1) William H. Curtis, architect; (2) Sandra Fetterolf, Executive Director of Council; (3) Hugh R. McBride, real estate appraiser; (4) Keith Klein, architect; and (5) Kenneth B. Foster, civil engineer. These persons opine that there is no viable use of the individual plaintiffs' land and/or that the Regional Plan's reliance on the land capability classes is not the most accurate.

In light of this Court's ruling that the complaint is premature and that on its face the Regional Plan is constitutional, these expert opinions do not raise any material issues of fact.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TAHOE-SIERRA PRESERVATION COUNCIL, INC., a California nonprofit corporation and membership organization,	No. 86-2266
Plaintiff-Appellants,	D.C. No. CV-R-84-257-ECR
v.	
TAHOE REGIONAL PLANNING AGENCY, a separate legal entity created pursuant to an interstate Compact between the States of California and Nevada, *et at.*,	ORDER [Filed on October 31, 1990]
Defendant-Appellee.	

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, District Judge, Presiding

Before: **FLETCHER, REINHARDT,** and **KOZINSKI** Circuit Judges.

The panel has voted to deny all petitions for rehearing and to reject all suggestions for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court requested a vote on the suggestion for rehearing en banc. Red. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX E

PUBLIC LAW 96-551 – DEC. 19, 1980

Public Law 96-551
96th Congress

An Act

To grant the consent of the Congress to the Tahoe Regional Planning Compact, and to authorize the Secretary of Agriculture and others to cooperate with the planning agency thereby created.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to encourage the wise use and conservation of the waters of Lake Tahoe and of the resources of the area around said lake, the consent of the Congress is hereby given to the Tahoe Regional Planning Compact heretofore adopted by the States of California and Nevada, which compact reads as follows:

TAHOE REGIONAL PLANNING COMPACT

ARTICLE I. FINDINGS AND DECLARATIONS OF POLICY

(a) It is found and declared that:

(1) The waters of Lake Tahoe and other resources of the region are threatened with deterioration or degeneration, which endangers the natural beauty and economic productivity of the region.

(2) The public and private interests and investments in the region are substantial.

(3) The region exhibits unique environmental and ecological values which are irreplaceable.

(4) By virtue of the special conditions and circumstances of the region's natural ecology, developmental pattern, population distribution and human needs, the region is experiencing problems of resource use and deficiencies of environmental control.

(5) Increasing urbanization is threatening the ecological values of the region and threatening the public opportunities for use of the public lands.

(6) Maintenance of the social and economic health of the region depends on maintaining the significant scenic, recreational, educational, scientific, natural and public health values provided by the Lake Tahoe Basin.

(7) There is a public interest in protecting, preserving and enhancing these values for the residents of the region and for visitors to the region.

(8) Responsibilities for providing recreational and scientific opportunities, preserving scenic and natural areas, and safeguarding the public who live, work and play in or visit the region are divided among local governments, regional agencies, the States of California and Nevada, and the federal government.

(9) In recognition of the public investment and multistate and national significance of the recreational values, the federal government has an interest in the acquisition of recreational property and the management of resources in the region to preserve environmental and recreational values, and the federal government should assist the states in fulfilling their responsibilities.

(10) In order to preserve the scenic beauty and outdoor recreational opportunities of the region, there is a need to insure an equilibrium between the region's natural endowment and its manmade environment.

(b) In order to enhance the efficiency and governmental effectiveness of the region, it is imperative that there be established a Tahoe Regional Planning Agency with the powers conferred by this compact including the power to establish environmental threshold carrying capacities and to adopt and enforce a regional plan and implementing ordinances which will achieve and maintain such capacities while providing opportunities for orderly growth and development consistent with such capacities.

(c) The Tahoe Regional Planning Agency shall interpret and administer its plans, ordinances, rules and regulations in accordance with the provisions of this compact.

ARTICLE II. DEFINITIONS

As used in this compact, the following terms have the following meanings:

(a) "Region," includes Lake Tahoe, the adjacent parts of Douglas and Washoe Counties and Carson City, which for the purposes of this compact shall be deemed a county, lying within the Tahoe Basin in the State of Nevada, and the adjacent parts of the Counties of Placer and El Dorado lying within the Tahoe Basin in the State of California, and that additional and adjacent part of the County of Placer outside of the Tahoe Basin in the State of California which lies southward and eastward of a line

starting at the intersection of the basin crestline and the north boundary of Section 1, thence west to the northwest corner of Section 3, thence south to the intersection of the basin crestline and the west boundary of Section 10; all sections referring to Township 15 North, Range 16 East, M.D.B. & M. The region defined and described herein shall be as precisely delineated on official maps of the agency.

(b) "Agency" means the Tahoe Regional Planning Agency.

(c) "Governing body" means the governing board of the Tahoe Regional Planning Agency.

(d) "Regional plan" means the long-term general plan for the development of the region.

(e) "Planning commission" means the advisory planning commission appointed pursuant to subdivision (h) of Article III.

(f) "Gaming" means to deal, operate, carry on, conduct, maintain or expose for play any banking or percentage game played with cards, dice or any mechanical device or machine for money, property, checks, credit or any representative of value, including, without limiting the generality of the foregoing, faro, monte, roulette, keno, bingo, fan-tan, twenty-one, blackjack, seven-and-a-half, big injun, klondike, craps, stud poker, draw poker or slot machine, but does not include social games played solely for drinks, or cigars or cigarettes served individually, games played in private homes or residences for prizes or games operated by charitable or educational

organizations, to the extent excluded by applicable state law.

(g) "Restricted gaming license" means a license to operate not more than 15 slot machines on which a quarterly fee is charged pursuant to NRS 463.373 and no other games.

(h) "Project" means an activity undertaken by any person, including any public agency, if the activity may substantially affect the land, water, air, space or any other natural resources of the region.

(i) "Environmental threshold carrying capacity" means an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety within the region. Such standards shall include but not be limited to standards for air quality, water quality, soil conservation, vegetation preservation and noise.

(j) "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors.

(k) "Areas open to public use" means all of the areas within a structure housing gaming under a nonrestricted license except areas devoted to the private use of guests.

(l) "Areas devoted to private use of guests" means hotel rooms and hallways to serve hotel room areas, and any parking areas. A hallway serves hotel room areas if more than 50 percent of the areas of each side of the hallway are hotel rooms.

(m) "Nonrestricted license" means a gaming license which is not a restricted gaming license.

ARTICLE III. ORGANIZATION

(a) There is created the Tahoe Regional Planning Agency as a separate legal entity.

The governing body of the agency shall be constituted as follows:

(1) California delegation:

(A) One member appointed by each of the County Boards of Supervisors of the Counties of El Dorado and Placer and one member appointed by the City Council of the City of South Lake Tahoe. Any such member may be a member of the county board of supervisors or city council, respectively, and shall reside in the territorial jurisdiction of the governmental body making the appointment.

(B) Two members appointed by the Governor of California, one member appointed by the Speaker of the Assembly of California and one member appointed by the Senate Rules Committee of the State of California. The members appointed pursuant to this subparagraph shall not be residents of the region and shall represent the public at large within the State of California. A member appointed by the Speaker of the Assembly or the Senate Rules Committee may, subject to confirmation by his or her appointing power, designate an alternate to attend meetings and vote in the absence of the appointed member. The designation of a named alternate, which shall

be in writing and contain evidence of confirmation by the appointing power, shall be kept on file with the agency. An appointed member may change his or her alternate from time to time, with the confirmation of the appointing power, but shall have only one designated alternate at a time. An alternate shall be subject to those qualifications and requirements prescribed by this compact that are applicable to the appointed member.

(2) Nevada delegation:

(A) One member appointed by each of the boards of county commissioners of Douglas and Washoe Counties and one member appointed by the Board of Supervisors of Carson City. Any such member may be a member of the board of county commissioners or board of supervisors, respectively, and shall reside in the territorial jurisdiction of the governmental body making the appointment.

(B) Two members appointed by the Governor of Nevada, one member appointed by the Speaker of the Assembly and one member appointed by the Majority Leader of the Nevada Senate. All members appointed pursuant to this subparagraph shall not be residents of the region and shall represent the public at large within the State of Nevada. A member appointed by the Speaker of the Nevada Assembly or the Majority Leader of the Nevada Senate may, subject to confirmation by his or her appointing power, designate an alternate to attend meetings and vote in the absence of the appointed member. The designation of a named alternate, which shall be in writing and contain evidence of confirmation by the

appointing power, shall be kept on file with the agency. An appointed member may change his or her alternate from time to time, with the confirmation of the appointing power, but shall have only one designated alternate at a time. An alternate shall be subject to those qualifications and requirements prescribed by this compact that are applicable to the appointed member.

(3) If any appointing authority under paragraph (1)(A), (1)(B), (2)(A) or (2)(B) fails to make such an appointment within 60 days after the effective date of the amendments to this compact or the occurrence of a vacancy on the governing body, the governor of the state in which the appointing authority is located shall make the appointment. The term of any member so appointed shall be 1 year.

(4) The position of any member of the governing body shall be deemed vacant if such a member is absent from three consecutive meetings of the governing body in any calendar year.

(5) Each member and employee of the agency shall disclose his economic interests in the region within 10 days after taking his seat on the governing board or being employed by the agency and shall thereafter disclose any further economic interest which he acquires, as soon as feasible after he acquires it. As used in this paragraph, "economic interests" means:

(A) Any business entity operating in the region in which the member or employee has a direct or indirect investment worth more than one thousand dollars ($1,000).

(B) Any real property located in the region in which the member or employee

has a direct or indirect interest worth more than one thousand dollars ($1,000).

(C) Any source of income attributable to activities in the region, other than loans by or deposits with a commercial lending institution in the regular course of business, aggregating two hundred fifty dollars ($250) or more in value received by or promised to the member within the preceding 12 months; or

(D) Any business entity operating in the region in which the member or employee is a director, officer, partner, trustee, employee or holds any position of management.

No member or employee of the agency shall make, or attempt to influence, an agency decision in which he knows or has reason to know he has an economic interest. Members and employees of the agency must disqualify themselves from making or participating in the making of any decision of the agency when it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the economic interests of the member or employee.

(b) The members of the agency shall serve without compensation, but the expenses of each member shall be met by the body which he represents in accordance with the law of that body. All other expenses incurred by the governing body in the course of exercising the powers conferred upon it by this compact unless met in some other manner specifically provided, shall be paid by the agency out of its own funds.

(c) The members of the governing body serve at the pleasure of the appointing authority in each case, but

each appointment shall be reviewed no less often than every 4 years. Members may be reappointed.

(d) The governing body of the agency shall meet at least monthly. All meetings shall be opened to the public to the extent required by the law of the State of California or the State of Nevada, whichever imposes the greater requirement, applicable to local governments at the time such meeting is held. The governing body shall fix a date for its regular monthly meeting in such terms as "the first Monday of each month," and shall not change such date more often than once in any calendar year. Notice of the date so fixed shall be given by publication at least once in a newspaper or combination of newspapers whose circulation is general throughout the region and in each county a portion of whose territory lies within the region. Notice of any special meeting, except an emergency meeting, shall be given by so publishing the date and place and posting an agenda at least 5 days prior to the meeting.

(e) The position of a member of the governing body shall be considered vacated upon his loss of any of the qualifications required for his appointment and in such event the appointing authority shall appoint a successor.

(f) The governing body shall elect from its own members a chairman and vice chairman, whose terms of office shall be 2 years, and who may be reelected. If a vacancy occurs in either office, the governing body may fill such vacancy for the unexpired term.

(g) Four of the members of the governing body from each state constitute a quorum for the transaction of the

business of the agency. The voting procedures shall be as follows:

(1) For adopting, amending or repealing environmental threshold carrying capacities, the regional plan, and ordinances, rules and regulations, and for granting variances from the ordinances, rules and regulations, the vote of at least four of the members of each state agreeing with the vote of at least four members of the other state shall be required to take action. If there is no vote of at least four of the members from one state agreeing with the vote of at least four of the members of the other state on the actions specified in this paragraph, an action of rejection shall be deemed to have been taken.

(2) For approving a project, the affirmative vote of at least five members from the state in which the project is located and the affirmative vote of at least nine members of the governing body are required. If at least five members of the governing body from the state in which the project is located and at least nine members of the entire governing body do not vote in favor of the project, upon a motion for approval, an action of rejection shall be deemed to have been taken. A decision by the agency to approve a project shall be supported by a statement of findings, adopted by the agency, which indicates that the project complies with the regional plan and with applicable ordinances, rules and regulations of the agency.

(3) For routine business and for directing the agency's staff on litigation and enforcement actions, at least eight members of the governing body must agree to take action. If at least eight votes in favor of such action are not cast, an action of rejection shall be deemed to have been taken.

Whenever under the provisions of this compact or any ordinance, rule, regulation or policy adopted pursuant thereto, the agency is required to review or approve any project, public or private, the agency shall take final action by vote, whether to approve, to require modification or to reject such project, within 180 days after the application for such project is accepted as complete by the agency in compliance with the agency's rules and regulations governing such delivery unless the applicant has agreed to an extension of this time limit. If a final action by vote does not take place within 180 days, the applicant may bring an action in a court of competent jurisdiction to compel a vote unless he has agreed to an extension. This provision does not limit the right of any person to obtain judicial review of agency action under subdivision (h) of Article VI. The vote of each member of the governing body shall be individually recorded. The governing body shall adopt its own rules, regulations and procedures.

(h) An advisory planning commission shall be appointed by the agency. The commission shall include: the chief planning officers of Placer County, El Dorado County, and the City of South Lake Tahoe in California and of Douglas County, Washoe County and Carson City in Nevada, the executive officer of the Lahontan Regional Water Quality Control Board of the State of California, the executive officer of the Air Resources Board of the State of California, the Director of the State Department of Conservation and Natural Resources of the State of Nevada, the Administrator of the Division of Environmental Protection in the State Department of Conservation and Natural Resources of the State of Nevada, the

Administrator of the Lake Tahoe Management Unit of the United States Forest Service, and at least four lay members with an equal number from each state, at least half of whom shall be residents of the region. Any official member may designate an alternate.

The term of office of each lay member of the advisory planning commission shall be 2 years. Members may be reappointed.

The position of each member of the advisory planning commission shall be considered vacated upon loss of any of the qualifications required or appointment, and in such an event the appointing authority shall appoint a successor.

The advisory planning commission shall elect from its own members a chairman and a vice chairman, whose terms of office shall be 2 years and who may be reelected. If a vacancy occurs in either office, the advisory planning commission shall fill such vacancy for the unexpired term.

A majority of the members of the advisory planning commission constitutes a quorum for the transaction of the business of the commission. A majority vote of the quorum present shall be required to take action with respect to any matter.

(i) The agency shall establish and maintain an office within the region, and for this purpose the agency may rent or own property and equipment. Every plan, ordinance and other record of the agency which is of such nature as to constitute a public record under the law of either the State of California or the State of Nevada shall

be opened to inspection and copying during regular office hours.

(j) Each authority charged under this compact or by the law of either state with the duty of appointing a member of the governing body of the agency shall by certified copy of its resolution or other action notify the Secretary of State of its own state of the action taken.

ARTICLE IV. PERSONNEL

(a) The governing body shall determine the qualification of, and it shall appoint and fix the salary of, the executive officer of the agency, and shall employ such other staff and legal counsel as may be necessary to execute the powers and functions provided for under this compact or in accordance with any intergovernmental contracts or agreements the agency may be responsible for administering.

(b) Agency personnel standards and regulations shall conform insofar as possible to the regulations and procedures of the civil service of the State of California or the State of Nevada, as may be determined by the governing body of the agency; and shall be regional and bistate in application and effect; provided that the governing body may, for administrative convenience and at its discretion, assign the administration of designated personnel arrangements to an agency of either state, and provided that administratively convenient adjustments be made in the standards and regulations governing personnel assigned under intergovernmental agreements.

(c) The agency may establish and maintain or participate in such additional programs of employee benefits as may be appropriate to afford employees of the agency terms and conditions of employment similar to those enjoyed by employees of California and Nevada generally.

ARTICLE V. PLANNING

(a) In preparing each of the plans required by this article and each amendment thereto, if any, subsequent to its adoption, the planning commission after due notice shall hold at least one public hearing which may be continued from time to time, and shall review the testimony and any written recommendations presented at such hearing before recommending the plan or amendment. The notice required by this subdivision shall be given at least 20 days prior to the public hearing by publication at least once in a newspaper or combination of newspapers whose circulation is general throughout the region and in each county a portion of whose territory lies within the region.

The planning commission shall then recommend such plan or amendment to the governing body for adoption by ordinance. The governing body may adopt, modify or reject the proposed plan or amendment, or may initiate and adopt a plan or amendment without referring it to the planning commission. If the governing body initiates or substantially modifies a plan or amendment, it shall hold at least one public hearing thereon after due notice as required in this subdivision.

If a request is made for the amendment of the regional plan by:

(1) A political subdivision a part of whose territory would be affected by such amendment; or

(2) The owner or lessee of real property which would be affected by such amendment,

the governing body shall complete its action on such amendment within 180 days after such request is accepted as complete according to standards which must be prescribed by ordinance of the agency.

(b) The agency shall develop, in cooperation with the States of California and Nevada, environmental threshold carrying capacities for the region. The agency should request the President's Council on Environmental Quality, the U.S. Forest Service and other appropriate agencies to assist in developing such environmental threshold carrying capacities. Within 18 months after the effective date of the amendments to this compact, the agency shall adopt environmental threshold carrying capacities for the region.

(c) Within 1 year after the adoption of the environmental threshold carrying capacities for the region, the agency shall amend the regional plan so that, at a minimum, the plan and all of its elements, as implemented through agency ordinances, rules and regulations, achieves and maintains the adopted environmental threshold carrying capacities. Each element of the plan shall contain implementation provisions and time schedules for such implementation by ordinance. The planning commission and governing body shall continuously

review and maintain the regional plan. The regional plan shall consist of a diagram, or diagrams, and text, or texts setting forth the projects and proposals for implementation of the regional plan, a description of the needs and goals of the region and a statement of the policies, standards and elements of the regional plan.

The regional plan shall be a single enforceable plan and include all of the following correlated elements:

> (1) A land use plan for the integrated arrangement and general location and extent of, and the criteria and standards for, the uses of land, water, air, space and other natural resources within the region, including but not limited to, an indication or allocation of maximum population densities and permitted uses.
>
> (2) A transportation plan for the integrated development of a regional system of transportation, including but not limited to parkways, highways, transportation facilities, transit routes, waterways, navigation facilities, public transportation facilities, bicycle facilities, and appurtenant terminals and facilities for the movement of people and goods within the region. The goal of transportation planning shall be:
>
> > (A) To reduce dependency on the automobile by making more effective use of existing transportation modes and of public transit to move people and goods within the region and
> >
> > (B) To reduce to the extent feasible air pollution which is caused by motor vehicles.
>
> Where increases in capacity are required, the agency shall give preference to providing such

capacity through public transportation and public programs and projects related to transportation. The agency shall review and consider all existing transportation plans in preparing its regional transportation plan pursuant to this paragraph.

The plan shall provide for an appropriate transit system for the region.

The plan shall give consideration to:

(A) Completion of the Loop Road in the States of Nevada and California;

(B) Utilization of a light rail mass transit system in the South Shore area; and

(C) Utilization of a transit terminal in the Kingsbury Grade area.

Until the regional plan is revised, or a new transportation plan is adopted in accordance with this paragraph, the agency has no effective transportation plan.

(3) A conservation plan for the preservation, development, utilization, and management of the scenic and other natural resources within the basin, including but not limited to, soils, shoreline and submerged lands, scenic corridors along transportation routes, open spaces, recreational and historical facilities.

(4) A recreation plan for the development, utilization, and management of the recreational resources of the region, including but not limited to, wilderness and forested lands, parks and parkways, riding and hiking trails, beaches and playgrounds, marinas, areas for skiing and other recreational facilities.

(5) A public services and facilities plan for the general location, scale and provision of public services and facilities, which, by the nature of

their function, size, extent and other characteristics are necessary or appropriate for inclusion in the regional plan.

In formulating and maintaining the regional plan, the planning commission and governing body shall take account of and shall seek to harmonize the needs of the region as a whole, the plans of the counties and cities within the region, the plans and planning activities of the state, federal and other public agencies and nongovernmental agencies and organizations which affect or are concerned with planning and development within the region.

(d) The regional plan shall provide for attaining and maintaining federal, state, or local air and water quality standards, whichever are strictest, in the respective portions of the region for which the standards are applicable.

The agency may, however, adopt air or water quality standards or control measures more stringent than the applicable state implementation plan or the applicable federal, state, or local standards for the region, if it finds that such additional standards or control measures are necessary to achieve the purposes of this compact. Each element of the regional plan, where applicable, shall, by ordinance, identify the means and time schedule by which air and water quality standards will be attained.

(e) Except for the Regional Transportation Plan of the California Tahoe Regional Planning Agency, the regional plan, ordinances, rules and regulations adopted by the California Tahoe Regional Planning Agency in effect on July 1, 1980, shall be the regional plan, ordinances, rules and regulations of the Tahoe Regional Planning Agency

for that portion of the Tahoe region located in the State of California. Such plan, ordinance, rule or regulation may be amended or repealed by the governing body of the agency. The plans, ordinances, rules and regulations of the Tahoe Regional Planning Agency that do not conflict with, or are not addressed by, the California Tahoe Regional Planning Agency's plans, ordinances, rules and regulations referred to in this subdivision shall continue to be applicable unless amended or repealed by the governing body of the agency. No provision of the regional plan, ordinances, rules and regulations of the California Tahoe Regional Planning Agency referred to in this subdivision shall apply to that portion of the region within the State of Nevada, unless such provision is adopted for the Nevada portion of the region by the governing body of the agency.

(f) The regional plan, ordinances, rules and regulations of the Tahoe Regional Planning Agency apply to that portion of the region within the State of Nevada.

(g) The agency shall adopt ordinances prescribing specific written findings that the agency must make prior to approving any project in the region. These findings shall relate to environmental protection and shall insure that the project under review will not adversely affect implementation of the regional plan and will not cause the adopted environmental threshold carrying capacities of the region to be exceeded.

(h) The agency shall maintain the data, maps and other information developed in the course of formulating and administering the regional plan, in a form suitable to assure a consistent view of developmental trends and

other relevant information for the availability of and use by other agencies of government and by private organizations and individuals concerned.

(i) Where necessary for the realization of the regional plan, the agency may engage in collaborative planning with local governmental jurisdictions located outside the region, but contiguous to its boundaries. In formulating and implementing the regional plan, the agency shall seek the cooperation and consider the recommendations of counties and cities and other agencies of local government, of state and federal agencies, of educational institutions and research organizations, whether public or private, and of civic groups and private persons.

ARTICLE VI. AGENCY'S POWERS

(a) The governing body shall adopt all necessary ordinances, rules, and regulations to effectuate the adopted regional plan. Except as otherwise provided in this compact, every such ordinance, rule or regulation shall establish a minimum standard applicable throughout the region. Any political subdivision or public agency may adopt and enforce an equal or higher requirement applicable to the same subject of regulation in its territory. The regulations of the agency shall contain standards including but not limited to the following: water purity and clarity; subdivision; zoning; tree removal; solid waste disposal; sewage disposal; land fills, excavations, cuts and grading; piers, harbors, breakwaters or channels and other shoreline developments; waste disposal in shoreline areas; waste disposal from boats;

mobile-home parks; house relocation; outdoor advertising; flood plain protection; soil and sedimentation control; air pollution; and watershed protection. Whenever possible without diminishing the effectiveness of the regional plan, the ordinances, rules, regulations and policies shall be confined to matters which are general and regional in application, leaving to the jurisdiction of the respective states, counties and cities the enactment of specific and local ordinances, rules, regulations and policies which conform to the regional plan.

The agency shall prescribe by ordinance those activities which it has determined will not have substantial effect on the land, water, air, space or any other natural resources in the region and therefore will be exempt from its review and approval.

Every ordinance adopted by the agency shall be published at least once by title in a newspaper or combination of newspapers whose circulation is general throughout the region. Except an ordinance adopting or amending the regional plan, no ordinance shall become effective until 60 days after its adoption. Immediately after its adoption, a copy of each ordinance shall be transmitted to the governing body of each political subdivision having territory within the region.

(b) No project other than those to be reviewed and approved under the special provisions of subdivisions (d), (e), (f) and (g) may be developed in the region without obtaining the review and approval of the agency and no project may be approved unless it is found to comply with the regional plan and with the ordinances, rules and

regulations enacted pursuant to subdivision (a) to effectuate that plan. The agency may approve a project in the region only after making the written findings required by this subdivision or subdivision (g) of Article V. Such findings shall be based on substantial evidence in the record.

Before adoption by the agency of the ordinances required in subdivision (g) of Article V, the agency may approve a project in the region only after making written findings on the basis of substantial evidence in the record that the project is consistent with the regional plan then in effect and with applicable plans, ordinances, regulations and standards of federal and state agencies relating to the protection, maintenance and enhancement of environmental quality in the region.

(c) The Legislatures of the States of California and Nevada find that in order to make effective the regional plan as revised by the agency, it is necessary to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan. Subject to the limitation provided in this subdivision, from the effective date of the amendments to this compact until the regional plan is amended pursuant to subdivision (c) of Article V, or until May 1, 1983, whichever is earlier:

> (1) Except as otherwise provided in this paragraph, no new subdivision, planned unit development, or condominium project may be approved unless a complete tentative map or plan has been approved before the effective date of the amendments to this compact by all agencies having jurisdiction. The subdivision of land

owned by a general improvement district, which existed and owned the land before the effective date of the amendments to this compact, may be approved if subdivision of the land is necessary to avoid insolvency of the district.

(2) Except as provided in paragraph (3), no apartment building may be erected unless the required permits for such building have been secured from all agencies having jurisdiction, prior to the effective date of the amendments to this compact.

(3) During each of the calendar years 1980, 1981, and 1982 no city or county may issue building permits which authorize the construction of a greater number of new residential units within the region than were authorized within the region by building permits issued by that city or county during calendar year 1978. For the period of January through April, 1983 building permits authorizing the construction of no more than 1/3 of that number may be issued by each such city or county. For purposes of this paragraph a "residential unit" means either a single family residence or an individual residential unit within a larger building, such as an apartment building, a duplex or a condominium.

The Legislatures find the respective numbers of residential units authorized within the region during calendar year 1978 to be as follows:

1. City of South Lake Tahoe and El Dorado County (combined)..... 252
2. Placer County..... 278
3. Carson City..... 0
4. Douglas County..... 339
5. Washoe County..... 739

(4) During each of the calendar years 1980, 1981 and 1982, no city or county may issue building permits which authorize construction of a greater square footage of new commercial buildings within the region than were authorized within the region by building permits for commercial purposes issued by that city or county during the calendar year 1978. For the period of January through April, 1983 building permits authorizing the construction of no more than 1/3 the amount of that square footage may be issued by each such city or county.

The Legislatures find the respective square footages of commercial buildings authorized within the region during calendar year 1978 to be as follows:

1. City of South Lake Tahoe and El Dorado County (combined) 64,324
2. Placer County 23,000
3. Carson City 0
4. Douglas County 57,354
5. Washoe County 50,600

(5) No structure may be erected to house gaming under a nonrestricted license.

(6) No facility for the treatment of sewage may be constructed or enlarged except:

(A) To comply, as ordered by the appropriate state agency for the control of water pollution, with existing limitations of effluence under the Clean Water Act, 33 U.S.C. § 1251 et seq., and the applicable state law for control of water pollution; or

(B) To accommodate development which is not prohibited or limited by this subdivision; or

(C) In the case of Douglas County Sewer District #1, to modify or otherwise alter sewage treatment facilities existing on the effective date of the amendments to this compact so that such facilities will be able to treat the total volume of effluence for which they were originally designed which is 3.0 mgd. Such modification or alteration is not a "project"; is not subject to the requirements of Article VII; and does not require a permit from the agency. Before commencing such modification or alternative, however, the district shall submit to the agency its report identifying any significant soil erosion problems which may be caused by such modifications or alterations and the measures which the district proposes to take to mitigate or avoid such problems.

The moratorium imposed by this subdivision does not apply to work done pursuant to a right vested before the effective date of the amendments to this compact. Notwithstanding the expiration date of the moratorium imposed by this subdivision, no new highway may be built or existing highway widened to accommodate additional continuous lanes for automobiles until the regional transportation plan is revised and adopted.

The moratorium imposed by this subdivision does not apply to the construction of any parking garage which has been approved by the agency prior to May 4, 1979, whether that approval was affirmative or by default. The provisions of this paragraph are not an expression of legislative intent that any such parking garage, the approval of which is the subject of litigation

which was pending on the effective date of the amendments to this compact, should, or should not, be constructed. The provisions of this paragraph are intended solely to permit construction of such a parking garage if judgment sustaining the agency's approval to construct that parking garage has become final and no appeal is pending or may lawfully be taken to a higher court.

(d) Subject to the final order of any court of competent jurisdiction entered in litigation contesting the validity of an approval by the Tahoe Regional Planning Agency, whether that approval was affirmative or by default, if that litigation was pending on May 4, 1979, the agency and the States of California and Nevada shall recognize as a permitted and conforming use:

(1) Every structure housing gaming under a nonrestricted license which existed as a licensed gaming establishment on May 4, 1979, or whose construction was approved by the Tahoe Regional Planning Agency affirmatively or deemed approved before that date. The construction or use of any structure to house gaming under a nonrestricted license not so existing or approved, or the enlargement in cubic volume of any such existing or approved structure is prohibited.

(2) Every other nonrestricted gaming establishment whose use was seasonal and whose license was issued before May 4, 1979, for the same season and for the number and type of games and slot machines on which taxes or fees were paid in the calendar year 1978.

(3) Gaming conducted pursuant to a restricted gaming license issued before May 4, 1979, to the extent permitted by that license on that date.

The area within any structure housing gaming under a nonrestricted license which may be open to public use (as distinct from that devoted to the private use of guests and exclusive of any parking area) is limited to the area existing or approved for public use on May 4, 1979. Within these limits, any external modification of the structure which requires a permit from a local government also requires approval from the agency. The agency shall not permit restaurants, convention facilities, showrooms or other public areas to be constructed elsewhere in the region outside the structure in order to replace areas existing or approved for public use on May 4, 1979.

(e) Any structure housing licensed gaming may be rebuilt or replaced to a size not to exceed the cubic volume, height and land coverage existing or approved on May 4, 1979, without the review or approval of the agency or any planning or regulatory authority of the State of Nevada whose review or approval would be required for a new structure.

(f) The following provisions apply to any internal or external modification, remodeling, change in use, or repair of a structure housing gaming under a nonrestricted license which is not prohibited by article VI(d):

> (1) The agency's review of an external modification of the structure which requires a permit from a local government is limited to determining whether the external modification will do any of the following:
>
> > (A) Enlarge the cubic volume of the structure;

(B) Increase the total square footage of area open to or approved for public use on May 4, 1979;

(C) Convert an area devoted to the private use of guests to an area open to public use;

(D) Increase the public area open to public use which is used for gaming beyond the limits contained in paragraph (3); and

(E) Conflict with or be subject to the provisions of any of the agency's ordinances that are generally applicable throughout the region.

The agency shall make this determination within 60 days after the proposal is delivered to the agency in compliance with the agency's rules or regulations governing such delivery unless the applicant has agreed to an extension of this time limit. If an external modification is determined to have any of the effects enumerated in subparagraphs (A) through (C), it is prohibited. If an external modification is determined to have any of the effects enumerated in subparagraphs (D) or (E), it is subject to the applicable provisions of this compact. If an external modification is determined to have no such effect, it is not subject to the provisions of this compact.

(2) Except as provided in paragraph (3), internal modification, remodeling, change in use or repair of a structure housing gaming under a nonrestricted license is not a project and does not require the review or approval of the agency.

(3) Internal modification, remodeling, change in use or repair of areas open to the public use within a structure housing gaming

under a nonrestricted license which alone or in combination with any other such modification, remodeling, change in use or repair will increase the total portion of those areas which are used for gaming by more than the product of the total base area, as defined below, in square feet existing on or approved before August 4, 1980, multiplied by 15 percent constitutes a project and is subject to all of the provisions of this compact relating to projects. For purposes of this paragraph and the determination required by subdivision (g), base area means all of the area within a structure housing gaming under a nonrestricted license which may be open to public use, whether or not gaming is actually conducted or carried on in that area, except retail stores, convention centers and meeting rooms, administrative offices, kitchens, maintenance and storage areas, rest rooms, engineering and mechanical rooms, accounting rooms and counting rooms.

(g) In order to administer and enforce the provisions of subdivisions (d), (e) and (f), the State of Nevada, through its appropriate planning or regulatory agency, shall require the owner or licensee of a structure housing gaming under a nonrestricted license to provide:

(1) Documents containing sufficient information for the Nevada agency to establish the following relative to the structure:

(A) The location of its external walls;

(B) Its total cubic volume;

(C) Within its external walls, the area in square feet open or approved for public use and the area in square feet devoted to or approved for the private use of guests on May 4, 1979;

(D) The amount of surface area of land under the structure; and

(E) The base area as defined in paragraph (3) of subdivision (f) in square feet existing on or approved before August 4, 1980.

(2) An informational report whenever any internal modification, remodeling, change in use, or repair will increase the total portion of the areas open to public use which is used for gaming.

The Nevada agency shall transmit this information to the Tahoe Regional Planning Agency.

(h) Gaming conducted pursuant to a restricted gaming license is exempt from review by the agency if it is incidental to the primary use of the premises.

(i) The provisions of subdivisions (d) and (e) are intended only to limit gaming and related activities as conducted within a gaming establishment, or construction designed to permit the enlargement of such activities, and not to limit any other use of property zoned for commercial use or the accommodation of tourists, as approved by the agency.

(j) Legal actions arising out of or alleging a violation of the provisions of this compact, of the regional plan or of an ordinance or regulation of the agency or of a permit or a condition of a permit issued by the agency are governed by the following provisions:

(1) This subdivision applies to:

(A) Actions arising out of activities directly undertaken by the agency.

(B) Actions arising out of the issuance to a person of a lease, permit, license or other entitlement for use by the agency.

(C) Actions arising out of any other act or failure to act by any person or public agency.

Such legal actions may be filed and the provisions of this subdivision apply equally in the appropriate courts of California and Nevada and of the United States.

(2) Venue lies:

(A) If a civil or criminal action challenges an activity by the agency or any person which is undertaken or to be undertaken upon a parcel of real property, in the state or federal judicial district where the real property is situated.

(B) If an action challenges an activity which does not involve a specific parcel of land (such as an action challenging an ordinance of the agency), in any state or federal court having jurisdiction within the region.

(3) Any aggrieved person may file an action in an appropriate court of the State of California or Nevada or of the United States alleging noncompliance with the provisions of this compact or with an ordinance or regulation of the agency. In the case of governmental agencies, "aggrieved person" means the Tahoe Regional Planning Agency or any state, federal or local agency. In the case of any person other than a governmental agency who challenges an action of the Tahoe Regional Planning Agency, "aggrieved person" means any person who has appeared, either in person, through an authorized representative, or in writing, before the agency at an appropriate administrative hearing

to register objection to the action which is being challenged, or who had good cause for not making such an appearance.

(4) A legal action arising out of the adoption or amendment of the regional plan or of any ordinance or regulation of the agency, or out of the granting or denial of any permit, shall be commenced within 60 days after final action by the agency. All other legal actions shall be commenced within 65 days after discovery of the cause of action.

(5) In any legal action filed pursuant to this subdivision which challenges an adjudicatory act or decision of the agency to approve or disapprove a project, the scope of judicial inquiry shall extend only to whether there was prejudicial abuse of discretion. Prejudicial abuse of discretion is established if the agency has not proceeded in a manner required by law or if the act or decision of the agency was not supported by substantial evidence in light of the whole record. In making such a determination the court shall not exercise its independent judgment on evidence but shall only determine whether the act or decision was supported by substantial evidence in light of the whole record. In any legal action filed pursuant to this subdivision which challenges a legislative act or decision of the agency (such as the adoption of the regional plan and the enactment of implementing ordinances), the scope of the judicial inquiry shall extend only to the questions of whether the act or decision has been arbitrary, capricious or lacking substantial evidentiary support or whether the agency has failed to proceed in a manner required by law.

(6) The provisions of this subdivision do not apply to any legal proceeding pending on

the date when this subdivision becomes effective. Any such legal proceeding shall be conducted and concluded under the provisions of law which were applicable prior to the effective date of this subdivision.

(7) The security required for the issuance of a temporary restraining order or preliminary injunction based upon an alleged violation of this compact or any ordinance, plan, rule or regulation adopted pursuant thereto is governed by the rule or statute applicable to the court in which the action is brought unless the action is brought by a public agency or political subdivision to enforce its own rules, regulations and ordinances in which case no security shall be required.

(k) The agency shall monitor activities in the region and may bring enforcement actions in the region to ensure compliance with the regional plan and adopted ordinances, rules, regulations and policies. If it is found that the regional plan, or ordinances, rules, regulations and policies are not being enforced by a local jurisdiction, the agency may bring action in a court of competent jurisdiction to ensure compliance.

(l) Any person who violates any provision of this compact or of any ordinance or regulation of the agency or of any condition of approval imposed by the agency is subject to a civil penalty not to exceed five thousand dollars ($5,000). Any such person is subject to an additional civil penalty not to exceed five thousand dollars ($5,000) per day, for each day on which such a violation persists. In imposing the penalties authorized by this subdivision, the court shall consider the nature of the violation and shall impose a greater penalty if it was

willful or resulted from gross negligence than if it resulted from inadvertence or simple negligence.

(m) The agency is hereby empowered to initiate, negotiate and participate in contracts and agreements among the local governmental authorities of the region, or any other intergovernmental contracts or agreements authorized by state or federal law.

(n) Each intergovernmental contract or agreement shall provide for its own funding and staffing, but this shall not preclude financial contributions from the local authorities concerned or from supplementary sources.

(o) Every record of the agency, whether public or not, shall be open for examination to the Legislature and Controller of the State of California and the Legislative Auditor of the State of Nevada.

(p) Approval by the agency of any project expires 3 years after the date of final action by the agency or the effective date of the amendments to this compact, whichever is later, unless construction is begun within that time and diligently pursued thereafter, or the use or activity has commenced. In computing the 3-year period any period of time during which the project is the subject of a legal action which delays or renders impossible the diligent pursuit of that project shall not be counted. Any license, permit or certificate issued by the agency which has an expiration date shall be extended by that period of time during which the project is the subject of such legal action as provided in this subdivision.

(q) The governing body shall maintain a current list of real property known to be available for exchange with

the United States or with other owners of real property in order to facilitate exchanges of real property by owners of real property in the region.

ARTICLE VII. ENVIRONMENTAL IMPACT STATEMENTS

(a) The Tahoe Regional Planning Agency when acting upon matters that have a significant effect on the environment shall:

(1) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(2) Prepare and consider a detailed environmental impact statement before deciding to approve or carry out any project. The detailed environmental impact statement shall include the following:

(A) The significant environmental impacts of the proposed project;

(B) Any significant adverse environmental effects which cannot be avoided should the project be implemented;

(C) Alternatives to the proposed project;

(D) Mitigation measures which must be implemented to assure meeting standards of the region;

(E) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity;

(F) Any significant irreversible and irretrievable commitments of resources which would be involved in the proposed project should it be implemented; and

(G) The growth-inducing impact of the proposed project;

(3) Study, develop and describe appropriate alternatives to recommended courses of action for any project which involves unresolved conflicts concerning alternative uses of available resources;

(4) Make available to states, counties, municipalities, institutions and individuals, advice and information useful in restoring, maintaining and enhancing the quality of the region's environment; and

(5) Initiate and utilize ecological information in the planning and development of resource-oriented projects.

(b) Prior to completing an environmental impact statement, the agency shall consult with and obtain the comments of any federal, state or local agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate federal, state and local agencies which are authorized to develop and enforce environmental standards shall be made available to the public and shall accompany the project through the review processes. The public shall be consulted during the environmental impact statement process and views shall be solicited during a public comment period not to be less than 60 days.

(c) Any environmental impact statement required pursuant to this article need not repeat in its entirety any

information or data which is relevant to such a statement and is a matter of public record or is generally available to the public, such as information contained in an environmental impact report prepared pursuant to the California Environmental Quality Act or a federal environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969. However, such information or data shall be briefly described in the environmental impact statement and its relationship to the environmental impact statement shall be indicated.

In addition, any person may submit information relative to a proposed project which may be included, in whole or in part, in any environmental impact statement required by this article.

(d) In addition to the written findings specified by agency ordinance to implement the regional plan, the agency shall make either of the following written findings before approving a project for which an environmental impact statement was prepared:

> (1) Changes or alterations have been required in or incorporated into such project which avoid or reduce the significant adverse environmental effects to a less than significant level; or
>
> (2) Specific considerations, such as economic, social or technical, make infeasible the mitigation measures or project alternatives discussed in the environmental impact statement on the project.

A separate written finding shall be made for each significant effect identified in the environmental impact

statement on the project. All written findings must be supported by substantial evidence in the record.

(e) The agency may charge and collect a reasonable fee from any person proposing a project subject to the provisions of this compact in order to recover the estimated costs incurred by the agency in preparing an environmental impact statement under this article.

(f) The agency shall adopt by ordinance a list of classes of projects which the agency has determined will not have a significant effect on the environment and therefore will be exempt from the requirement for the preparation of an environmental impact statement under this article. Prior to adopting the list, the agency shall make a written finding supported by substantial evidence in the record that each class of projects will not have a significant effect on the environment.

ARTICLE VIII. FINANCES

(a) On or before September 30 of each calendar year the agency shall establish the amount of money necessary to support its activities for the next succeeding fiscal year commencing July 1 of the following year. The agency shall apportion $75,000 of this amount among the counties within the region on the same ratio to the total sum required as the full cash valuation of taxable property within the region in each county bears to the total full cash valuation of taxable property within the region. In addition, each county within the region in California shall pay $18,750 to the agency and each county within the region in Nevada, including Carson City, shall pay $12,500 to the agency, from any funds available therefore.

The State of California and the State of Nevada may pay to the agency by July 1, of each year any additional sums necessary to support the operations of the agency pursuant to this compact. If additional funds are required, the agency shall make a request for the funds to the States of California and Nevada. Requests for state funds must be apportioned two-thirds from California and one-third from Nevada. Money appropriated shall be paid within 30 days.

(b) The agency may fix and collect reasonable fees for any services rendered by it.

(c) The agency shall submit an itemized budget to the states for review with any request for state funds, shall be strictly accountable to any county in the region and the states for all funds paid by them to the agency and shall be strictly accountable to all participating bodies for all receipts and disbursement.

(d) The agency is authorized to receive gifts, donations, subventions, grants, and other financial aids and funds; but the agency may not own land except as provided in subdivision (i) of Article III.

(e) The agency shall not obligate itself beyond the moneys due under this article for its support from the several counties and the states for the current fiscal year, plus any moneys on hand or irrevocably pledged to its support from other sources. No obligation contracted by the agency shall bind either of the party states or any political subdivision thereof.

ARTICLE IX. TRANSPORTATION DISTRICT

(a) The Tahoe transportation district is hereby established as a special purpose district. The boundaries of the district are coterminous with those of the region.

(b) The business of the district shall be managed by a board of directors consisting of:

(1) One member of the county board of supervisors of each of the counties of El Dorado and Placer;

(2) One member of the city council of the City of South Lake Tahoe;

(3) One member each of the board of county commissioners of Douglas County and of Washoe County;

(4) One member of the board of supervisors of Carson City.

(c) The vote of at least four of the directors must agree to take action. If at least four votes in favor of an action are not cast, an action of rejections shall be deemed to have been taken.

(d) The Tahoe transportation district may in accordance with the adopted transportation plan:

(1) Own and operate a public transportation system to the exclusion of all other publicly owned transportation systems in the region.

(2) Acquire upon mutually agreeable terms any public transportation system or facility owned by a county, city or special purpose district or any privately owned transportation system or facility within the region.

(3) Hire the employees of existing public transportation systems that are acquired by the

district without loss of benefits to the employees, bargain collectively with employee organizations, and extend pension and other collateral benefits to employees.

(4) Fix the rates and charges for transit services provided pursuant to this subdivision.

(5) Issue revenue bonds and other evidence of indebtedness.

(6) By resolution, determine and propose for adoption a tax for the purpose of obtaining services of the district. The tax proposed must be general and of uniform operation throughout the region, and may not be graduated in any way. The district is prohibited from imposing an ad valorem tax, a tax measured by gross or net receipts on business, a tax or charge that is assessed against people or vehicles as they enter or leave the region, and any tax, direct or indirect, on gaming tables and devices.

Any such proposition must be submitted to the voters of the district and shall become effective upon approval of a majority of the voters voting on the proposition. The revenues from any such tax must be used for the services for which it was imposed, and for no other purpose.

(7) Provide service from inside the region to convenient airport, railroad and interstate bus terminals without regard to the boundaries of the region.

(e) The Legislatures of the States of California and Nevada may, by substantively identical enactments, amend this article.

ARTICLE X. MISCELLANEOUS

(a) It is intended that the provisions of this compact shall be reasonably and liberally construed to effectuate

the purposes thereof. Except as provided in subdivision (c), the provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining state and in full force and effect as to the state affected as to all severable matters.

(b) The agency shall have such additional powers and duties as may hereafter be delegated or imposed upon it from time to time by the action of the Legislature of either state concurred in by the Legislature of the other.

(c) A state party to this compact may withdraw therefrom by enacting a statute repealing the compact. Notice of withdrawal shall be communicated officially and in writing to the Governor of the other state and to the agency administrators. This provision is not severable, and if it is held to be unconstitutional or invalid, no other provision of this compact shall be binding upon the State of Nevada or the State of California.

(d) No provision of this compact shall have any effect upon the allocation, distribution or storage of interstate waters or upon any appropriate water right.

Sec. 2. The Secretary of Agriculture and the heads of other appropriate agencies are authorized, upon the request of the Tahoe Regional Planning Agency, to cooperate with the Tahoe Regional Planning Agency in all respects compatible with carrying out the normal duties of their agencies.

Sec. 3. The consent to the compact by the United States is subject to the condition that the President may appoint a nonvoting representative of the United States to the governing body of the Tahoe Regional Planning Agency.

Sec. 4. Any additional powers conferred on the agency pursuant to article X, section 1(b) of the compact shall not be exercised unless consented to by the Congress.

Sec. 5. Nothing contained in this Act or in the compact consented to shall in any way affect the powers, rights, or obligations of the United States, or the applicability of any law or regulation of the United States in, over or to the region or waters which are the subject of the compact, or in any way affect rights owned or held by or for Indians or Indian tribes subject to the jurisdiction of the United States.

Sec. 6. The right is hereby reserved by the Congress or any of its standing committees to require the disclosure and furnishing of such information and data by or concerning the Tahoe Regional Planning Agency as is deemed appropriate by the Congress or such committee.

Sec. 7. The right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved December 19, 1980.

APPENDIX F

Lawrence L. Hoffman
Robert Damon Spitzer
Randall M. Faccinto
Gregg R. Lien
HOFFMAN, LIEN, FACCINTO & SPITZER
Post Office Box 7740
Tahoe City, California 95730
(916) 583-8542

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

The TAHOE-SIERRA PRESERVATION COUNCIL INC., a California non-profit corporation and membership organization; Robert W. Alexander and Maria G. Alexander; Richard A. Allison and Noreen C. Allison; Mary M. Alvarez; Alpine Investment Co., Ltd.; Amco, Inc.; Jeffrey B. Anderson and Beth C. Anderson; Peter J. Andersen and Janet I. Andersen; William B. Anderson and Evelyn M. Anderson; Donald F. Archibald and Victoria Archibald; Jean L. Atherton; Alfred A. Avey and Shirley Avey; Air Continental Jet Charter, Inc.; David E. Baker and Maxine A. Baker; John H. Baker; Pierino C. Barengo; James E. Bateman and Cheryl J. Bateman; Vincent A. Bauer and Alice R. Bauer; James W. Beckler	CIV. NO.: CV-R-84-257-ECR COMPLAINT FOR INVERSE CONDEMNATION, DENIAL OF CONSTITUTIONAL AND CIVIL RIGHT, DAMAGES, AND DECLARATORY AND INJUNCTIVE RELIEF [Filed on June 25, 1984]

and June F. Beckler; Derril D.)
Bergt and Patricia M. Bergt; H. I.)
Birr, III; Leroy G. Black and Ida B.)
Black; Jerome O. Blomberg;)
Constance Boucher; John Franklin)
Boydston and Jean Anne Boydston;)
Louis G. Brennan and Cynthia B.)
Brennan; Robert Bride; Harris J.)
Buchbinder; George C. Byrd;)
Alberta J. Calvert; Sam Camhi and)
Lillian A. Camhi; James A. Carster;)
Maureen B. Cassidy; Cave Rock)
Estates, a General Partnership;)
William M. Charney and Susan W.)
Charney; Walter F. Ciceric; Terry)
Bradley Clark; George B. Clifford;)
Woodworth B. Clum; William G.)
Collins, Jr. and Beverly R. Collins;)
Thomas F. Combs; James A. Cone)
and Beverly J. Cone; Thomas A.)
Constantino; Joseph J. Cooke;)
Patricia Deal; Robert DeMello;)
Robert J. Derr; D.M.C.)
Corporation; James J. Dorst and)
Beverly Ann Dorst; Josephine A.)
Dudek and Michael N. Dudek;)
Wiaczeslaw Duss and Vera Duss;)
Edwards Heat Treating Service, a)
California Corporation; James W.)
Ehrenburg and Phyllis C.)
Ehrenburg; Gene F. Empey; Sarah)
E. Erlach; Jan J. Erteszek; Keith L.)
Evans and Fern L. Evans; Donald)
L. Everingham; Floyd T. Fall;)
Albert W. Fink; Gayle Fisher;)
Marie G. Garland; Tony Gentile)
and Nina Gentile; Harry F. Getz)
and Betty J. Getz; Russel R.)
Goebel; Fred R. Golish and Beverly)

A. Golish; Thomas S. Goto and)
Hideko Goto; Lynn R. Grady; Bert)
Grafton, Jr.; Arthur A. Granholm)
and Rebecca Granholm; Richard F.)
Gray and Faye F. Gray; Great)
California Gray; Richard A.)
Griswold and Madeline C.)
Griswold; Laura Grotenstein;)
Dennis Guidi, Frank Guidi and)
Evelyn Guidi; John J. Haher and)
Margaret L. Haher; Robert V. Hale)
and Merla J. Hale; William L.)
Hane; Jack L. Hare and Lavina L.)
Hare; Kenneth J. Harrington;)
Thomas A. Haslett and Stella M.)
Haslett; William J. Havlek and Lea)
M. Havlek; Steven J. Hayden and)
Ann Hayden; Dennis L. Heckerson;)
Ira W. Helgren and Clayton E.)
Helgren; Robert L. Helms; Larry)
D. Henry; James S. Hetherington)
and Audrey O. Hetherington;)
Harold Zane Hewitt and Ruth B.)
Hewitt; Thomas Hill; Malcolm C.)
Hodge; William P. Hoffman and)
Louise W. Hoffman; Willie E.)
Horne and Latricia J. Horne;)
Hosford Corporation; Edgar M.)
Howard; Hutton Associates; Ralph)
W. Ince; Incline Lake Corporation;)
William Irwin; Robert Marshall)
Jelderks; Daniel E. Johnson and)
Margaret R. Johnson; Lloyd O.)
Johnson; Raymond O. Johnson and)
Cynthia Johnson; Lawrence E.)
Katelhut and Vanessa Anne)
Katelhut; Vincent S. Keele and)
Teddyanna P. Keele; George A.)
Kellner; William J. Kelly; Donald)

B. Keown; William J. Kerrigan and)
Jody Kerrigan; Pearl S. Kishimoto;)
Keith Klein; Valentine F. Klein and)
Valerie A. Klein; Polly W. Kline;)
George T. Knight and Joan L.)
Knight; Barry L. Krauss and Judas)
Krauss; Corinne J. Krebs; Todd)
Krueger and Nancy Krueger;)
Esther B. Langham; Lewis A.)
Larsen and Ferne J. Larsen; Walter)
W. Latimer and Ula E. Latimer;)
Jeffrey C. Laughlin and Vibeke A.)
Laughlin; Chelton Leonard and)
Peter C. Leonard; Don Leonard;)
Charles A. Lindberg and Bernice)
Lindberg; Ronald E. Lipori; Joseph)
A. Lunny, Jr. and Joan M. Lunny;)
Paulette L. Lutjens, et al.; Allan D.)
Lynn; Duane E. Mack; Gordon)
MacLean; Ed Malley; Edward)
Malley and Theresa B. Malley;)
Stanley L. Martin and Louise A.)
Martin; James S. Masterton and)
Jeanne J. Masterton; Milan)
Matejicek and Mary Matejicek; J.)
McBride; Fred K. McNeil, Jr.;)
Steven J. McNelly and Rita A.)
McNelly; Patrick Mark Magaree;)
Valentine D. Melvin; Frank E.)
Mertens and Audrey B. Mertens;)
Simos Michaelides and Virginia)
Michaelides; Clifford Ken Miura)
and Sandra A. Miura; LaJosh)
Mohachy and Sandra Mohachy;)
Roberta W. Mohler; Louis C.)
Moore and Sara Moore; Merilyn)
Morrison; Leon J. Moss and Carol)
L. Moss Kathy Mulligan; Carroll E.)
Myers and Sue M. Myers; Patricia)

Nading; John F. Nash and Mary G.)
Nash; Hilmer C. Nelson and)
Louise K. Nelson; Milton Nelson)
and Cecelia Nelson; David O.)
Nerger and Shirley R. Nerger;)
Nevada Club Enterprises, Inc.;)
Duane D. Newton and Carolyn E.)
Newton; Robert L. Nolan; Kenneth)
R. Norton; Myrl A. Nygren and)
Maie Nygren; William O'Brien and)
Dinah O'Brien; Doris G.)
Oldenburg; O.L. & L., Ltd., a)
Nevada Corporation; Russel B.)
Patrick; William Paynter and Lee)
Paynter; Allan J. Perrone; Sam)
Perry; Wayne L. Peterson and)
Frances E. Petersen; Gerald A.)
Phillips and Martha J. Phillips;)
Neil W. Plath and Virginia H.)
Plath; Linsfield W. Poteet and)
Lucile E. Poteet; Joseph D. Price;)
Worth E. Prine and Betty Jo Prine;)
Richard D. Provost and Adele K.)
Provost; Stanley G. Prussin; Peter)
T. Psyllos; Edward Rahe; Vaughan)
S. Reams; William B. Reiner and)
Ann H. Reiner; Eric W. Rettig;)
Patricia Poznik Riley; Phillip Travis)
Roberts, Jr. and Mary C. Roberts;)
James Y. Robertson; Ronald L.)
Rodgers and E.O. Rodeffer;)
William G. Rodkey and Karin M.)
Rodkey; Donald W. Rosendahl and)
Carole L. Rosendahl; Bruce L.)
Roudebush; Hortense E. Rozman;)
Thomas A. Rudy and Arlene J.)
Rudy; Norman Ruiz and Julie P.)
Ruiz; Michael Rutberg and Helen)
Rutberg; E. Kent Salas and)

Dorothy M. Salas; Laray)
Schouweiler and E.F. Schouweiler;)
Kurt R. Schwenn and Adelaide P.)
Schwenn; Donald F. Sedmak and)
Madelyn A. Sedmak; Vivian Sefton;)
Ronald C. Seipel and Lucretia E.)
Seipel; John Sells and Carol Sells;)
Jack Shelly and Catherine Shelly;)
Bryan Shieman and Joy L.)
Shieman; Frank C. Simpson;)
Harold F. Smiley and Beulah S.)
Smiley; J.D. Smith and Ruth Smith;)
Col. Philip E. Smith and Lee L.)
Smith; Albert B. Solari; Paul)
Donner Spencer and Eve Page)
Spencer; Roger C. Steele; William)
D. Stewart and Dorothy J. Stewart;)
Charles E. Street; Sarah Strong;)
Doina E. Tanasescu; Lewis)
Thigpen; Edward T. Thom;)
Raymond B. Thompson; Rodney J.)
Thorsen and Roberta J. Thorsen;)
David V. Threlkel; William F.)
Tisdell and Patsy A. Tisdell; Robert)
E. Townsend; Courtney Tremaine)
and Sharon Y. Tremaine; James H.)
Trevor; Richard M. Valderiote and)
Polly P. Valeriote; Louis Varanese)
and Ann Marie Varanese; Thomas)
N. Vaughn and Marilyn L. Vaughn;)
John W. Viglione and Marcia C.)
Viglione; Joe Vitale and Dorothy)
Vitale; Sal Vitale and Ollie A.)
Vitale; Lucille Wagner; Margaret L.)
Wallace; Jack O. Walther and)
Nancy E. Walther; Edmond E.)
Ward and Dolores A. Ward; Gwen)
Weiner and Lucile Weiner; Thad)
Wiley; Bernarr L. Wilson and)

Margaret C. Wilson; Jean Wiltfong; Mirian H. Wingfield; John A. Winn and Ellen S. Winn; Robert Winn and Dorothy R. Winn; Peter W. Wright and June D. Wright; Zein A. Yountchi and Patsy B. Yountchi; Donald E. Zwald and Suzanne Zwald,

Plaintiffs,

v.

The TAHOE REGIONAL PLANNING AGENCY, a separate legal entity created pursuant to an interstate Compact between the States of California and Nevada; the voting members of the Governing Body of the TAHOE REGIONAL PLANNING AGENCY including TONY CLARK, CHESTER A. GIBBS, ALEXANDER HAAGEN, III, STAN HANSEN THOMAS HSIEH, JAMES KING, ROBERT PRUETT, JAMES S. REED, LARRY SEVISON, THOMAS STEWART, WILLIAM D. SWACKHAMER, PEGGY TWEDT, ROLAND D. WESTERGARD, and NORMAN C. WOODS; the State of Nevada; and the State of California,

Defendants.

Plaintiffs allege as follows:

I. JURISDICTION AND VENUE

1. This action challenges certain portions of the "Regional Plan for the Lake Tahoe Basin" adopted on April 26, 1984, by the Defendant TAHOE REGIONAL PLANNING AGENCY, a bi-state planning body formed by an interstate compact, and arises under the Compact Clause (Article 1, Section 10, Clause 3) of the Constitution of the United States, the Fifth and Fourteenth Amendments to the Constitution of the United States, the Federal Civil Rights Act (42 U.S.C. Secs. 1983 and 1985), 28 U.S.C. Secs. 2201 and 2202 (Declaratory Relief), and the Tahoe Regional Planning Compact (P.L. 96-551; 94 Stat. 3233) as hereafter more fully appears. Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Secs. 1331 and 1343 and Article VI(j)* of the Tahoe Regional Planning Compact (hereafter the "Compact").

---

* Article VI(j) of the Compact reads in pertinent part:

"(j) Legal actions arising out of or alleging a violation of the provisions of this compact, of the regional plan or of an ordinance or regulation of the agency or of a permit or a condition of a permit issued by the agency are governed by the following provisions:

(1) This subdivision applies to:

(A) Actions arising out of activities directly undertaken by the agency.

(B) Activities arising out of the issuance to a person of a lease, permit, license or other entitlement for use by the agency.

(Continued on following page)

2. Venue is proper in this Court pursuant to Article VI(j) of the Compact and 28 U.S.C. Secs. 1391 et seq., in that all real properties which are the subject of this action are situated in the State of Nevada.

(Continued from previous page)

(C) Actions arising out of any other act or failure to act by any person or public agency.

Such legal actions may be filed and the provisions of this subdivision apply equally in the appropriate courts of California and Nevada and of the United States.

(2) Venue lies:

(A) If a civil or criminal action challenges an activity by the agency or any person which is undertaken or to be undertaken upon a parcel of real property, in the state or federal judicial district where the real property is situated.

(B) If an action challenges an activity which does not involve a specific parcel of land (such as an action challenging an ordinance of the agency), in any state or federal court having jurisdiction within the region.

(3) Any aggrieved person may file an action in an appropriate court of the State of California or Nevada or of the United States alleging noncompliance with the provisions of this compact or with an ordinance or regulation of the agency. * * *

(4) A legal action arising out of the adoption or amendment of the regional plan or of any ordinance or regulation of the agency . . . shall be commenced within 60 days after final action by the Agency. * * * "

II. NATURE OF ACTION

3. This action challenges the validity and constitutionality of certain specific provisions of the "Regional Plan for the Lake Tahoe Basin" (hereafter the "Regional Plan") adopted on April 26, 1984, by the Governing Body of the Defendant TAHOE REGIONAL PLANNING AGENCY (hereafter "TRPA") allegedly pursuant to the Tahoe Regional Planning Compact,* which provisions directly and specifically prohibit any reasonable, practical, viable, beneficial, or feasible use of thousands of legally-created lots or parcels of privately-owned real property in the Lake Tahoe Basin, and specifically preclude the construction of single-family homes on, or any other reasonable use of, the lots or parcels owned by those Plaintiffs who are parties to this action (named Plaintiffs). This action is brought by the Plaintiff TAHOE-SIERRA PRESERVATION COUNCIL, INC. (hereafter "PRESERVATION COUNCIL"), a non-profit membership organization whose principal purpose is to represent the interests of Lake Tahoe area property owners who are its members, and by 364 individually named Plaintiffs, each

---

* The original Tahoe Regional Planning Compact, an interstate agreement, was adopted by the States of California and Nevada and approved by the Congress and signed by the President on December 18, 1969. See P.L. 91-148, 83 Stat. 360; California Government Code Section 66801; Nevada Revised Statute 277.200. Said Compact was extensively amended in 1980 by legislative enactments of the States of California and Nevada, which were then approved by the Congress and signed into law by President Carter on December 19, 1980. See P.L. 96-551, 94 Stat. 3233; California Government Code Section 66801; Nevada Revised Statute 277.200. Unless otherwise indicated all references to the Compact are to the 1980 amended Compact.

of whom is the owner of real property located within the Lake Tahoe Basin subject to the prohibitions and restrictions contained in the Regional Plan complained of herein. Specifically, this action seeks declaratory, injunctive, and monetary relief based on the following claims:

A. *FIRST CLAIM FOR RELIEF*: SEZ Properties – Declaratory and Injunctive Relief for Violation of Fifth and Fourteenth Amendment Protections Against Taking of Private Property Without Due Process of Law and Denial of Equal Protection.

B. *SECOND CLAIM FOR RELIEF*: SEZ Properties – Damages for Violation of Fifth and Fourteenth Amendment Protections Against Taking Private Property Without Just Compensation.

C. *THIRD CLAIM FOR RELIEF*: Class 1, 2, and/or 3 Properties – Declaratory and Injunctive Relief for Violation of Fifth and Fourteenth Amendment Protections Against Taking of Private Property Without Due Process of Law.

D. *FOURTH CLAIM FOR RELIEF*: Class 1, 2, and/or 3 Properties – Declaratory and Injunctive Relief for Violation of Constitutional Protection Against Denial of Equal Protection.

E. *FIFTH CLAIM FOR RELIEF*: Class 1, 2, and/or 3 Properties – Damages for Violation of Fifth and Fourteenth Amendment Protections Against Taking Private Property Without Just Compensation.

F. *SIXTH CLAIM FOR RELIEF*: Deprivation of Plaintiffs' Rights to Receive the Benefits of

Special Public Improvements (Sewage Collection, Water Service, etc.) for Which They Have Been Assessed and Paid.

G. *SEVENTH CLAIM FOR RELIEF*: Violation of the Federal Civil Rights Act (42 U.S.C. 1983 and 1985).

III. PARTIES

4. Plaintiff PRESERVATION COUNCIL is a California non-profit public corporation, in good standing, incorporated on January 16, 1981, under the laws of the State of California, and has its principal office in the State of California. The PRESERVATION COUNCIL is a membership organization representing approximately 2,000 dues-paying members who own private real property, both improved and unimproved, located in the Lake Tahoe Basin, which real properties are subject to the planning and regulatory jurisdiction of Defendant TRPA.* The principal purpose of the PRESERVATION COUNCIL is to serve and actively represent the interests of its members, individually and collectively, before the Defendant TRPA and other legislative bodies and regulatory agencies in connection with its members' use and enjoyment of their private properties located in the Lake Tahoe Basin, and to ensure the rights and interests of its members are fully represented and protected insofar as possible. All of PRESERVATION COUNCIL'S members owning

---

* Article II(a) of the Compact defines the precise geographical boundaries of the "region" subject to the jurisdiction of the TRPA. For purposes of this Complaint, that region is commonly identified herein as the "Lake Tahoe Basin".

real property in the Lake Tahoe Basin have a direct interest in the planning and regulatory activities of TRPA, and particularly the specific provisions of the Regional Plan complained of herein which directly and specifically prohibit any reasonable or practical use of certain private real property as more fully set forth hereafter. Among its members are each of the 364 named Plaintiffs joining in this action, each of whom own legally-created lots or parcels of real property located within the Lake Tahoe Basin, which properties are located in areas either identified by the Regional Plan as a so-called Stream Environment Zone ("SEZ") or in a so-called Land Capability Class 1, 2, and/or 3 area, and therefore are subject to the permanent prohibitions and restrictions imposed by the Defendant TRPA set forth in its Regional Plan, which are the subject of this action. Additionally, the PRESERVATION COUNCIL members include numerous others who also own properties in the Lake Tahoe Basin subject to the prohibitions on use of SEZ or Class 1, 2, and/or 3 properties imposed by the Defendant TRPA which are the subject of this action. The PRESERVATION COUNCIL, through its authorized representatives, has actively participated in the entire TRPA regional planning process leading to the adoption of the new Regional Plan at issue in this action, and has attended and expressed its views an concerns, orally and in writing, at each public hearing held by the Defendant TRPA in connection with the consideration of the amended Regional Plan at issue herein. The PRESERVATION COUNCIL, and its members who own real property within the Lake Tahoe Basin and who have made substantial financial investments in their

property, are directly and vitally interested in the protection and the preservation of the unique environmental and scenic resources of the Lake Tahoe Basin, and firmly believe that protection and preservation can be achieved in a manner consistent with the protections guaranteed by the United States Constitution and other applicable laws (thus the name PRESERVATION COUNCIL). The PRESERVATION COUNCIL therefore brings this action as a matter of public right to compel Defendants, and each of them, to perform their public duties and responsibilities in a manner that is fully consistent with their statutory and Constitutional obligations.

5. Each of the named Plaintiffs listed in Appendices A and B* hereto are owners of one or more lawfully-created, vacant or undeveloped lots or parcels of real property located in the State of Nevada within the jurisdiction of the Defendant TRPA, which lots or parcels are subject to the newly-adopted specific and direct prohibitions on any reasonable, practical, beneficial, feasible, or viable use set forth in the Regional Plan due to the fact they appear to be substantially in areas identified as so-called "Stream Environment Zone". Additional relevant

---

* In order to provide for a more orderly pleading, all of the detailed allegations specifically regarding the property and interests of each individual Plaintiff are set forth in separate Appendices, grouped by geographical jurisdiction and category of property involved, which Appendices are identified by an appropriate designation: Appendix A – Plaintiffs Owning SEZ Properties Located in Washoe County; Appendix B – Plaintiffs Owning SEZ Properties in Douglas County; Appendix C – Plaintiffs Owning Class 1, 2, and/or 3 Properties Located in Washoe County; and Appendix D – Plaintiffs Owning Class 1, 2, and/or 3 Properties Located in Douglas County.

factual allegations regarding each of such Plaintiffs, and the real property of each Plaintiff at issue, are set forth in Appendices A and B hereto, applicable to Plaintiffs owning SEZ properties within the Counties of Washoe and Douglas respectively, State of Nevada, which Appendices are incorporated herein as if set forth here in full.

6. Each of the named Plaintiffs listed in Appendices C and D hereto are the owners of one or more lawfully-created, vacant or undeveloped, lots or parcels of real property located in the State of Nevada within the jurisdiction of the Defendant TRPA, which lots or parcels are subject to the newly-adopted specific and direct prohibitions contained in the Regional Plan precluding any reasonable, practical, beneficial, feasible, or viable use by virtue of their designation and restrictions imposed in the Regional Plan, and accompanying Plan Maps, as being substantially in an area identified as a Land Capability District 1, 2, and/or 3. Additional relevant factual allegations regarding each of such Plaintiffs, and the specific real property of each Plaintiff at issue, is more particularly set forth in Appendices C and D hereto, applicable to Plaintiffs owning properties in areas identified as within a Land Capability Class 1, 2, and/or 3 area within the Counties of Washoe and Douglas respectively, State of Nevada, which Appendices are incorporated herein as if set forth here in full.

7. Defendant TRPA is a separate legal entity created by the interstate Compact between the States of California and Nevada (see Compact, Article III(a)). Defendant TRPA is under the direction of a Governing Body consisting of 14 voting members (and one non-voting representative appointed by the President pursuant to Sec. 3 of

P.L. 96-551), and is otherwise subject to and directed by the provisions of the Compact. Defendants TONY CLARK, CHESTER A. GIBBS, ALEXANDER HAAGEN, III, STAN HANSEN, THOMAS HSIEH, JAMES KING, ROBERT PRUETT, JAMES S. REED, LARRY SEVISON, THOMAS STEWART, WILLIAM D. SWACKHAMER, PEGGY TWEDT, ROLAND D. WESTERGARD, and NORMAN C. WOODS, are each voting members of the Defendant TRPA's GOVERNING BODY, and are sued in that capacity. Defendant TRPA, acting through the required affirmative vote of the Defendant members of its Governing Body, duly adopted the amended Regional Plan, and the policies therein, prohibiting any reasonable use of Plaintiffs' private real properties giving rise to this action.

8. Defendant State of California and Defendant State of Nevada are the parties to the bi-state Compact, a contract between the two States. Each State adopted identical legislation creating the bi-state TRPA, including the 1980 amendments to the Compact. Each State has delegated, transferred, or conferred a part of its sovereign powers to the TRPA and invested the TRPA with the police powers it purports to exercise in adopting those portions of its Regional Plan at issue herein. Each State appointed or designated four "State representatives" to serve on its respective 7-member delegation*. The

---

* Article III(a) of the Compact provides for the following representation on the 7-member delegations to the TRPA Governing Body from each state:

California: 2 members appointed by the Governor; 1 member appointed by the Speaker of the Assembly; 1 member appointed by the Senate Rules Committee (all of the foregoing

(Continued on following page)

appointed representatives of each State directly participated in the deliberations and votes approving those portions of the Regional Plan at issue herein. Each State has accepted the obligation to provide funding for the operation and activities of the Defendant TRPA as provided in Article VIII(a) of the Compact. Further, each Defendant State independently enacted legislation and/or related mandates requiring the collection and export of all sewage waste from the Lake Tahoe Basin, and requiring the construction of major sewer treatment facilities and sewer collection and transport systems, which were constructed and funded under the applicable requirements and laws of each State, in part by assessments levied against all affected private properties including the properties of the named Plaintiffs. Each State is now a party to those actions by the Defendant TRPA which deny and deprive the named Plaintiffs of the benefits from the

---

(Continued from previous page)

"shall represent the public at large within the State of California"; 1 member appointed by each of the Boards of Supervisors of Placer and El Dorado Counties; and 1 member appointed by the City Council of the City of South Lake Tahoe.

Nevada: 1 member appointed by the Governor; the Secretary of State or his designee; the Director of the State Department of Conservation and Natural Resource (all of the foregoing "represent the public at large within the State of Nevada"); 1 member appointed by each of the County Commissioners of Douglas and Washoe Counties; 1 member appointed by the Board of Supervisors of Carson City; and a seventh member appointed by the six other members, or by the Governor, (as is the case with the current appointee) in the event the other six cannot agree on the seventh.

improvements for which they have been assessed and paid, all as more specifically complained of hereafter.

IV. FACTUAL BACKGROUND

9. The Lake Tahoe "region" ("Lake Tahoe Basin") is that area defined in Article II(a) of the Compact. It lies within the boundaries of the States of California and Nevada, and is within the geographical boundaries of the following local government jurisdictions – Placer County, California; El Dorado County, California; Washoe County, Nevada; the unincorporated portion of Carson City, Nevada; and Douglas County, Nevada. The City of South Lake Tahoe lying within the El Dorado County portion of the Basin is the only incorporated city in the region. Both Defendant States, and the aforementioned local governments, pursuant to applicable state laws and local ordinances, exercise land use regulatory jurisdiction within their respective areas and have adopted general planning and/or zoning requirements for their respective portions of the Lake Tahoe Basin as well as statutory procedures for the division of land into lots or parcels. Further, approximately 66% of the land area of the Lake Tahoe Basin is within the ownership of the United States government, managed by the United States Forest Service. A total of approximately 72% of the Lake Tahoe Basin is publicly owned, either by the Forest Service or other federal agencies, by the Defendant States, or by local government jurisdictions. Approximately 28% of the land areas of the Lake Tahoe Basin are currently in private ownership, and approximately 15% of the Lake Tahoe Basin is considered to be "urbanized".

10. Commencing in the late 1800's, in response to demands from families and individuals seeking summer homesites in the Lake Tahoe Basin, the first single-family home subdivisions were "platted" and lot sales commenced, mostly along the California shoreline of Lake Tahoe. By World War II, a large number of single-family lots had been created, mostly on the California side of the Basin, but with some on the Nevada side of the Lake Tahoe Basin. Following World War II, there was a marked increase in the urbanization of the Lake Tahoe Basin as a result of major population increases in the western United States and the desire for vacation homesites and permanent residences in the Lake Tahoe Basin. Commencing in the early 1950's and extending well into the 1970's, in response to the increased population demands and growth in the western United States, public policy of the federal, state and local governments permitted and authorized, and even encouraged, the creation of single-family residential homesites, mostly in single-family subdivisions, in the Lake Tahoe Basin. That public policy was evidenced by at least the following:

A. The California Counties of Placer and El Dorado adopted and approved zoning requirements and general plans permitting and encouraging the creation of single-family subdivisions, and approving numerous single-family subdivisions pursuant to applicable state and local laws and regulation, including the provisions of the California Subdivision Map Act (California Government Code Section 66410 et seq.). Similarly, the Nevada Counties of Douglas and Washoe also encouraged, approved and authorized numerous single-family subdivisions pursuant to Nevada Revised Statutes

278.320-278.630, Douglas County Code Title 16, and Washoe County Code Chapter 115, including approximately 10,000 single-family homesites in a planned community known as Incline Village which began construction in the early 1960's. The approved tentative and final maps for subdivisions in both states typically required the developer to install such improvements as roads, water service and electric power, and drainage and runoff improvements, as a condition to the creation of single-family lots, although in many instances the cost of those public improvements was spread by assessments against the affected lots or parcels. In brief, thousands of single-family lots and parcels have been lawfully created in the Lake Tahoe Basin pursuant to the policies, laws, and other lawful requirements of the Defendant States and the local governments, and in some cases with the direct approval of the Defendant TRPA, of which TRPA estimates approximately 19,300 are still "vacant", that is, not yet used for construction of an actual home or other use.

B. Three principal public utility districts were formed under California law on the California side of the Lake Tahoe Basin (the South Tahoe Public Utility District, the Tahoe City Public Utility District, and the North Tahoe Public Utility District). Additionally, numerous General Improvement and Sewer Districts were formed on the Nevada side of the Lake Tahoe Basin (including the Incline Village General Improvement District, the Douglas County Sewer Improvement District, and numerous smaller districts). Each of these districts has as its principal purpose the construction and operation of sewage collection and disposal systems, and/or

waterworks systems, to service the developed portions of the Lake Tahoe Basin, including the aforementioned legally-created lots and parcels. The construction and development of the sewage collection, water service facilities, and other similar public improvements were funded in significant part through the sale of public improvement bonds repaid through assessments levied against private real property in the Lake Tahoe Basin, including the properties owned by the named Plaintiffs as more particularly alleged hereafter and in Appendices A through D hereto.

C. Pursuant to gubernatorial executive orders and legislation adopted by both the States of California and Nevada requiring the export of sewage wastes from the Tahoe Basin (California Water Code Sections 13950-13951, and Nevada Revised Statute 445.100 and Nevada Executive Order dated January 27, 1971, issued by Gov. O'Callaghan), and relying in part on Federal grants provided under the Federal Water Pollution Control Act (P.L. 92-500), four major sewer treatment and export facilities were constructed during the period from 1968 through 1978, including: the South Tahoe Public Utility District's plant which sends highly treated effluent 27 miles from South Tahoe to a man-made reservoir in Alpine County; the Douglas County Sewer Improvement District Plant and the Incline Village General Improvement Plant which pump their treated effluent to the Carson Valley; and the Tahoe-Truckee Sanitation Agency facility located in the Martis Valley completed in 1978, and recently further expanded, which services the west and north shores of Lake Tahoe. A significant

portion of the expenses of undertaking these regional sewage treatment collection facilities was funded by assessments against private properties in the Lake Tahoe Basin levied pursuant to the applicable laws of the Defendant States, including those assessments levied against the real properties of the named Plaintiffs as more particularly alleged hereafter and set forth in Appendices A through D hereto.

D. The Defendant States required the review, approval, and issuance of "public reports" by their respective Departments of Real Estate authorizing the sale of single-family lots pursuant to the applicable laws of the States of California and Nevada (California Real Estate Law, Business and Professions Code Section 10,000 et seq., and Nevada Revised Statutes, Chapter 119), pursuant to which public reports developers of single-family lots or parcels initially sold lots or parcels to the general public, including the Plaintiffs or their predecessors in interest, subject to the conditions and regulations imposed by the respective Departments of Real Estate of the Defendant States.

E. The development by numerous federal, state, and local governmental agencies of other public works and facilities necessary to service single-family homesites and other private development including State highways, County and City roads, runoff and storm drain systems, water storage and distribution systems, as well as schools, hospitals, fire and police services and facilities, and other related public services.

Taken as a whole, the foregoing activities and policies of the federal, state and local governments have encouraged, authorized, and approved the creation and sale of thousands of private parcels and lots, primarily as single-family homesites, within the Lake Tahoe Basin, including specifically those lots or parcels owned by the named Plaintiffs as alleged herein.

11. In the late 1960's, after extensive consideration, debate, and negotiations, the States of California and Nevada each adopted the necessary enabling legislation to create the initial TAHOE REGIONAL PLANNING AGENCY, which, after Congressional approval, was signed by President Richard Nixon on December 18, 1969. (P.L. 91-148, 83 Stat. 360; California Government Code Section 66801; and N.R.S. 277.200).

12. Pursuant to the initial Compact, the TRPA's Governing Body of 10 members was created and mandated to adopt a Regional Plan for the Tahoe Basin within 18 months after formation of the Agency. After the initial adoption of an interim Plan, the Governing Body undertook a detailed study of the Lake Tahoe Basin, and after extensive debate and discussions, finally adopted a new Regional Plan in December, 1971. Thereafter, during 1972, the TRPA Governing Body adopted a number of ordinances implementing the Plan, including its Land Use Ordinance (Ordinance No. 4) adopted on February 10, 1972. Pursuant to that 1971 Regional Plan and 1972 Land Use Ordinance, the entire Basin was overlaid with a new set of land use districts or zoning which substantially downzoned the Basin from the theoretical capacity then permitted under local government plans and ordinances.

13. The 1972 Land Use Ordinance and 1971 Regional Plan specifically recognized the legitimacy of existing, lawfully-created single-family lots. Thus, Section 9.13 of the 1972 Land Use Ordinance provided:

> "One (1) single-family house may be constructed on any existing legal lot or parcel of record as of February 10, 1972, that is located in any district except Tourist Commercial or General Commercial, provided, however, that this section shall not apply to lots in residential subdivisions where the final map of such subdivision was approved and filed for record more than five (5) years prior to February 10, 1972, and there has been no constructions of road, sewers or other substantial facilities serving the subdivision, or the posting of performance bonds assuring such construction, prior to February 10, 1972."

Additionally, pursuant to said 1971 Regional Plan and 1972 Land Use Ordinance, as well as its Subdivision Ordinance (Ordinance No. 7) adopted on March 22, 1972, the Defendant TRPA established a process to review and approve additional new subdivision proposals intended to create additional single-family lots and parcels, and thereafter continued until December, 1980 to accept applications and process and approve proposals for new single-family subdivisions within the Lake Tahoe Basin, thereby authorizing the creation of additional single-family lots or parcels.

14. Also, commencing in the late 1960's, following a joint agreement of the governors of both the Defendant States of Nevada and California, necessary laws and requirements were adopted and thereafter enforced by both Defendant States mandating the collection and

export of all sewage waste from the Lake Tahoe Basin and the phase out of all existing septic and similar on-site disposal systems. In order to fulfill that bi-state mandate, four major regional sewage collection treatment and disposal facilities were constructed as described in Paragraphs 10 B. and C. above, and a vast network of sewage collection and transport piping was installed throughout the Lake Tahoe Basin, including the installation of sewage collection mains to serve each lot in each existing single-family subdivision, and specifically the lots or parcels owned by the named Plaintiffs as more particularly alleged herein. A substantial portion of the costs of such sewage treatment and collection facilities were spread as assessments or special taxes on the private properties served by the respective systems, and became the legal obligation of the property owners so assessed, including the named Plaintiffs as alleged in the Appendices hereto, each of whom has paid and continues to be required to pay their respective share of the costs and expenses of such improvements through assessments levied against their respective properties.

15. Commencing in 1969, the United States Forest Service and the Defendant TRPA cooperated in a joint environmental land-use planning study of the Lake Tahoe Basin. During 1971, the Forest Service, in cooperation with the Defendant TRPA, completed a reconnaissance-level land capability study of the Lake Tahoe Basin. Soil and geomorphic information was compiled on maps at a scale of 2 inches to the mile, from which a Land Capability Map was prepared for the Basin which was subsequently utilized in the 1971 TRPA Regional Plan. Additionally, a detailed report, entitled "Land Capability

Classification of the Lake Tahoe basin, California-Nevada, a Planning Guide", was written and prepared by Robert G. Bailey, an employee of the Forest Service, which report was issued in 1974 (the so-called "Bailey Report"). Pursuant to that joint land capability study, all lands within the Tahoe Basin were divided into seven principal categories, or Land Capability Classes, distinguished according to the theoretical risk of erosion or disturbance hazards. Class 1 areas include those areas that have the highest theoretical risk of runoff or erosion due primarily to soil types and steeper slopes, while Class 7 areas are those where the existence of such conditions is theoretically negligible. Additionally, the "Bailey Report" and Land Capability Map recommended that, for planning purposes, area-wide limits be placed on "allowable impervious cover" (man-made coverage such as footprints of houses and buildings, driveways, highways and roads, and other similar impervious coverage) ranging from 1% allowable coverage in Class 1 areas up to 30% in Class 6 and 7 areas. The land capability criteria were incorporated in the Defendant TRPA's 1971 Regional Plan and 1972 Land Use Ordinance with additional requirements that expressly permitted the construction of single-family homes on lots and parcels identified in all land capability areas, subject to certain land coverage limits and other regulations contained in the Plan and implementing ordinances.

16. In 1978, the Defendant TRPA approved its "Lake Tahoe Basin Water Quality Management Plan" (hereafter the "1978 Water Quality Management Plan"), pursuant to Section 208 of the Federal Clean Water Act (P.L. 92-500), which 1978 Water Quality Management Plan became the

water quality element of TRPA's Regional Plan. The 1978 Water Quality Management Plan set forth programs for waste management, surface water runoff management, erosion control, and a program for implementation. Also, for the first time, it identified and delineated areas known as Stream Environment Zones (SEZ's). The Plan described a Stream Environment Zone as:

> "*Stream Environment Zone* – That region: 1) which surrounds a stream, including major streams, minor streams and drainageways, which owes its biological and physical characteristics to the presence of water; 2) which may be inundated by a stream; or 3) in which actions of man or nature may directly or indirectly affect the stream. A stream includes small lakes, ponds, and marshy areas through which the stream flows." (1978 TRPA Water Quality Management Plan. Vol. II, p. III-2.)

The SEZ's were then delineated on the 1" = 400' scale land use/land capability maps of the Defendant TRPA using the procedures found in the 1978 Water Quality Management Plan (Page VI-13 thru 15 of Volume I, and Pages III-2 thru 6 of Volume II). The mapping also included a buffer strip on either side of stream channels ranging in width from 25 feet to 100 feet, depending on the order or magnitude of the stream. The 1978 Water Quality Management Plan also set forth construction requirements in Volume II, *Handbook of Best Management Practices* ("BMP's") for all construction occurring within an identified SEZ, which requirements were intended to minimize or avoid the potential adverse impact of construction within Stream Environment Zones. Those BMP's provided in part that where a parcel or lot was substantially within the boundaries of a SEZ zone, then any new

construction would be permitted only if it was sited on the best available site on the property taking into consideration drainage, access, soil type, vegetation, hydrological characteristics, elevation, topography, and distance from the natural channel. Accordingly, the 1978 Water Quality Management Plan continued to permit the reasonable use of the parcels or lots owned by those named Plaintiffs identified as being in SEZ areas, provided construction of new homes on those SEZ lots took place in strict accordance with the requirements, including the BMP's, set forth in the 1978 Water Quality Management Plan.

17. As of December 19, 1980, the effective date of the amended Compact, the named Plaintiffs, and each of them, were the owners of one or more legally-created lots or parcels of record of real property within the Lake Tahoe Region, as more specifically described and set forth in Appendices A through D to this Complaint. Each of such lots or parcels owned by named Plaintiffs was legally created, approved, and sold to named Plaintiffs, or their predecessors in interest, pursuant to the legal requirements of the Defendant State of Nevada, and the applicable local government and/or TRPA requirements for the creation of such lots or parcels. The zoning and other land-use requirements of each of the affected local government agencies having jurisdiction over said properties authorized, and continue today to authorize, the named Plaintiffs to construct a single-family home on each parcel of record or make other reasonable use thereof. Additionally, as set forth in Paragraph 13 above, the lawfully-adopted Regional Plan and ordinances of the Defendant TRPA in force and effect on December 19,

1980, including the 1978 Water Quality Management Plan described above and the ordinances, rules and regulations adopted thereunder, authorized the construction of at least one single-family home on each of the parcels or lots owned by the named Plaintiffs.* Further, nearly all of the parcels or lots owned by the named Plaintiffs are located in existing single-family neighborhoods or subdivisions which are today partially built-out with other single-family homes (ranging from 20% to 90% built-out). Nearly all of those single-family subdivisions are currently served by paved roads, water systems, and sewage collection and treatment facilities, as well as electrical power, telephone service, and other necessary utilities. As set forth with greater specifically in Appendices A through D hereto, Plaintiffs, and their predecessors in

---

* On the California-Side of the Lake Tahoe Basin, in addition to the TRPA and local government regulations in effect on the California side, two other regulatory programs were also in effect on December 19, 1980, or are currently in effect:

(1) The Regional Plan, ordinances and regulations of the California Tahoe Regional Planning Agency (CTRPA) created in 1967 pursuant to California Government Code Sec. 67,000 et seq., which agency was deactivated in April, 1984, upon the adoption of TRPA's Regional Plan pursuant to California Government Code Section 67131. The provisions of the TRPA Regional Plan, and its implementing ordinances, supersede prior CTRPA requirements.

(2) The provisions and restrictions set forth in that "Lake Tahoe Basin Water Quality Plan" adopted on October 29, 1980, by the California Water Resources Control Board, which contain certain prohibitions on the use of private property currently being challenged in the Superior Court for Placer County in that action entitled *Tahoe-Sierra Preservation Council, et al. v. State Water Resources Control Board et al.* (Placer County Superior Court No. 58789).

interest, as the owners of said real properties, have been obligated to pay those assessments and special taxes assessed against their respective properties in partial payment for the sewer systems, water systems, roads and other improvements designed and intended to serve homes and other structures to be built upon their properties. Further, each of the named Plaintiffs, in purchasing their property and in continuing to make substantial payments in the way of property taxes and bond assessments, have done so in reliance on the fact that their lots or parcels were legally-created and zoned for the purposes set forth with greater specificity in Appendices A through D, primarily for the purpose of ultimately constructing a single-family home to serve as a permanent, retirement or vacation residence. Further, Plaintiffs have relied in good faith, and now to their detriment, upon the actions of the Defendant States and the Defendant TRPA in purchasing their properties, with the understanding that until at least until December 19, 1980, their properties were considered to be lawfully-created lots or parcels upon which Plaintiffs, provided they complied with all reasonable requirements for building and construction, could proceed to make a reasonable use by building thereon a home or other structure at a time of their choosing.

V. 1980 AMENDED COMPACT AND 1984 REGIONAL PLAN AND PROHIBITIONS ON USE OF PLAINTIFFS' PROPERTIES*

18. In the late 1970's, because of concerns about alleged weaknesses in the initial TRPA Compact,

---

* True and Correct copies of the Regional Plans and ordinances referred to in this Complaint will be submitted as evidence, or lodged with the Court, in a timely manner when this matter is set for hearing.

legislators from the States of California and Nevada met in private to negotiate amendments to the initial Compact. Those amendments were subsequently adopted by the Nevada Legislature at a special session of that Legislature held in September, 1980, and signed by its Governor, and thereafter adopted by the California Legislature and signed by its Governor. The legislation was then ratified by the United States Congress (with minor amendments added in Sections 2 through 5 of P.L. 96-551) and approved by President Carter on December 19, 1980, at which time the amended Compact became effective. The amended Compact dramatically changed the makeup, functions, and duties of the Defendant TRPA and its Governing Body, including among numerous others the following: an increase in the composition of the Governing Body from 10 to 14 voting members; changes in the Governing Body's voting procedures for taking actions upon certain matters as set forth in Article III(g) of the Compact, including the requirement that at least 4 members of each State's delegation (a total of at least 8) act to approve the environmental threshold carrying capacities and Regional Plan amendments described hereafter; changes in the project review procedures (Articles III(g)(2), V(g) and VI(b); and the addition of a new Article VII requiring preparation of Environmental Impact Statements for certain projects. The amended Compact also required that the Defendant TRPA, acting through its Governing Body, do the following:

(a) Within 18 months after the effective date of the amendments to the Compact, the Defendant TRPA was required to adopt "environmental threshold carrying capacities" for the region; and

> (b) Within one year after the adoption of the environmental threshold carrying capacities, TRPA "shall amend the regional plan (the 1971 Regional Plan) so that, at a minimum, the plan and all of its elements, as implemented through agency ordinances, rules and regulations, achieves and maintains the adopted environmental threshold carrying capacities." (Article V(b) and (c))

Article V(c) of the Compact then sets forth at length and with specificity the nature and content of the required amendments the Regional Plan.

19. Pursuant to the provisions of Article VI(a) of the Compact, Defendant TRPA is required to adopt "all necessary ordinances, rules, and regulations to effectuate the adopted regional plan". Pursuant to Article VI(b), "No project (defined in Article II(h)) . . . may be developed in the region without obtaining the review and approval of the agency and no project may be approved unless it is found to comply with the regional plan and with the ordinances, rules and regulations enacted pursuant to subdivision (a) to effectuate that plan".

20. Pursuant to Article VI(c) of the Compact, a "limited moratorium" was also placed into effect, commencing December 19, 1980, to last during the 30-month planning period in order to "halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan". That moratorium placed numerical limits on the number of building permits which could be authorized for new residential units or commercial projects, temporarily prohibited new subdivision, planned unit developments, or

condominium projects that had not previously received a complete tentative map, and imposed other limitations on public works, casinos, and other development "until the regional plan is amended pursuant to subdivision (c) of Article V, or until May 1, 1983, which ever is earlier".

21. In addition to the interim moratorium imposed by Article VI(c) of the Compact, the TRPA Governing Body, acting on its own initiative, shortly after being reconstituted by the amended Compact, proceeded to consider and adopt amendments to its 1978 Water Quality Management Plan, allegedly to meet a mandate of the State of California and the United States Environmental Protection Agency, which amendments were adopted by way of TRPA's Ordinance No 81-5 which was passed and adopted by the Defendant TRPA on June 25, 1981. Pursuant to the applicable provisions of Ordinance No. 81-5, the following interim prohibitions were placed into effect:

A. An interim prohibition was placed upon any construction, use or activity on lands within Land Capability Districts 1, 2, or 3, with a very limited exception on the Nevada side of the Basin permitting approval of construction of some single-family homes on Class 1, 2, and/or 3 lots pursuant to a "case-by-case system" set forth in the Ordinance, and with the exception of certain residential remodeling and reconstruction, public works projects, outdoor recreation facilities, and other specific exceptions set forth in Sections 2.00 of the Ordinance. Pursuant to the provisions of Section 11 of Ordinance NO. 81-5, and other later actions taken by TRPA including its Ordinance No. 82-7, the Nevada-side case-by-case exception effectively expired on August 28, 1983

(the last date for applications), while the prohibition on construction on lands within Land Capability Districts 1, 2, and/or 3 continued in force and effect up to April 26, 1984, the date of adoption of the amended Regional Plan, at which time it was replaced by the permanent prohibitions and restrictions contained in the Regional Plan.

B. As to SEZ lands, Ordinance 81-5 also implemented a Basin-wide "interim prohibition" on any construction, work, use or activity upon lots or parcels substantially within areas identified as a SEZ, with certain limited exceptions for public works projects, man-modified areas, and approved erosion control work. The interim prohibition on construction on lots or parcels within SEZ's also expired on April 26, 1984, upon the adoption of the amendments to the Regional Plan, at which time it was replaced by the permanent prohibitions and restrictions described hereafter.

In summary, an interim moratorium was imposed by the Defendant TRPA, commencing on June 25, 1981, and continuing until April 26, 1984, which prohibited construction of single-family homes or other buildings on the lots or parcels of record owned by named Plaintiffs in Stream Environment Zone areas, and in Land Capability Districts 1, 2, and/or 3 (except for a limited number of lots or parcels which might have qualified under the very limited case-by-case exception applicable only to certain Class 1, 2, and/or 3 properties on the Nevada side in effect from June 21, 1981 to August 28, 1983). That interim moratorium has now been replaced with an even more severe, permanent, Basin-wide prohibition that precludes any reasonable or practical use whatsoever of named

Plaintiffs' properties, all as more particularly alleged hereafter.

22. On August 26, 1982, acting pursuant to its Resolution No. 82-11, the Governing Body of the Defendant TRPA adopted the "environmental threshold carrying capacities" provided for in Article V(b) of the Compact.

23. On August 26, 1983, due to the failure of the Defendant TRPA's Governing Body to adopt its amended Regional Plan within the one year required after adoption of the environmental threshold carrying capacities, and allegedly because it could not make the requisite project-approval findings set forth in Article V(g) of the Compact, the Defendant TRPA imposed by resolution still another moratorium prohibiting its staff from accepting or processing any additional applications for projects, including single-family home construction or other reasonable uses on Plaintiffs' properties, which additional moratorium extended by its terms until April 26, 1984, the date of adoption of the amended Regional Plan.

24. On March 29, 1984, the Defendant TRPA Governing Body finally approved on first reading, nearly one year after the Compact's deadline, the amendments to its Regional Plan at issue herein by approving its Ordinance No. 84-1 on second reading, thereby approving said amendments to its Regional Plan which became effective that date.* The new Regional Plan consists of a number of

---

* The Regional Plan amendments were originally adopted on the key "first reading" by the Defendant TRPA Governing Body by a 9-3 vote of its members, a bare one vote majority (2 members absent). On the perfunctory "second reading", it was

(Continued on following page)

documents and maps, all as more specifically listed and identified in Section 2.00 of Ordinance No. 84-1. The basic policy directives and mandates of the amended Regional Plan are set forth in "Part I: Goals and Policies", which in turn is divided into six separate elements: a Land Use Element, a Transportation Element, a Conservation Element, a Recreation Element, a Public Services and Facilities Element, and an Implementation Element. As set forth in the "Introduction" to Part I, each of the first five elements is intended to meet the requirements of Article V(c) of the Compact which specifies the required components of the Regional Plan, while the last element, Implementation, was added by the Defendant TRPA. In addition to the "Statement of Goals and Policies" in Part I, existing TRPA zoning and land use requirements are to be replaced with 175 Plan Area Statements, which will further set forth detailed policies and regulate land use in the 175 discrete planning areas into which the entire Lake Tahoe Basin has been divided by the Regional Plan. The Plan Area Statements are initially adopted as "interim policy guidelines" while they are being further modified and refined, and will become final as "land use regulations" on September 1, 1984 (see Ordinance No. 84-1, Sec. 2.12). Additionally, the Regional Plan includes a number of Plan Maps and overlays, also adopted by Ordinance

---

(Continued from previous page)

confirmed in a show of unity by a 13-0 vote (1 member absent). Pursuant to Article VI(a), the Ordinance approving the amendments to the Regional Plan became effective on April 26, 1984 when passed on second reading.

No. 84-1, including "Land Capability Overlays" (applicable copies of TRPA's Plan Maps showing the lots or parcels of the named Plaintiffs are included as part of the Appendices hereto). Said Plan Maps depict the boundaries of Class 1, 2, and 3 areas, and SEZ boundaries (shown as "1b" areas), subject to the caveat contained in Section 2.14 of Ordinance 84-1, and depict each lot or parcel owned by the named Plaintiffs at issue in this action.

25. The EIS for the Regional Plan prepared and approved by the Defendant TRPA and other supporting documentation for the amendments to the Regional Plan, identify approximately 19,300 vacant, lawfully-created, single-family lots or parcels that exist as of the effective date of adoption of the amended Regional Plan within the Lake Tahoe Basin, the great majority of which are located in partially built-out, fully approved and developed, single-family subdivisions served by roads, sewers, water, and other utilities. The amended Regional Plan continues to recognize such subdivisions as appropriate and proper locations for single-family residences and neighborhoods. Of those remaining vacant, lawfully-created, existing single-family lots or parcels of record, based upon the computerized data base of the Defendant TRPA, it is estimated that there are approximately 6,400 lots or parcels partially or wholly in areas identified on the Plan Maps as in Land Capability Districts 1, 2, or 3, and approximately 4,900 lots or parcels partially or wholly in areas identified as SEZ areas. Of the foregoing lots and parcels, approximately 5,650 are shown to be substantially (50% or more) within Land Capability Districts 1, 2, and/or 3, and 3,500 are shown to be substantially (50% or

more) within SEZ areas (a total of 9,150 lots or parcels or 47% of the remaining 19,300 vacant lots or parcels). The lots or parcels owned by each named Plaintiff are depicted on the Regional Plan maps adopted as part of the Regional Plan by the Agency, and identified in the computerized data base of the Defendant TRPA, as being within either a Class 1, 2, and/or 3 Land Capability area, or within an area identified as a SEZ (1b area) on the TRPA Land Capability Maps, so as to be subject to the prohibitions in the Regional Plan which are at issue.

26. As to all legally-created lots or parcels of record located in so-called SEZ areas, including those specific lots or parcels owned by those named Plaintiffs identified in Paragraph 5 above and more specifically described and alleged in Appendices A and B hereto, the amended Regional Plan directly and specifically imposes a total and permanent prohibition on the further use or development of such parcels or lots as single-family homesites, or for any other practical or viable use, through the adoption of the following specific goals and policies set forth in the "Conservation Element" of Part I of the Regional Plan, pp. 99-102:

> *"GOAL #1"* PROVIDE OR THE LONG-TERM PRESERVATION AND RESTORATION OF STREAM ENVIRONMENT ZONES
>
> "The value of SEZ's crosses many interests and their preservation is a means for achieving numerous environmental thresholds. Policies that promote their maintenance, protection, and restoration are listed below.
>
> * * *

"POLICIES"

* * *

"2. SEZ LANDS SHALL BE PROTECTED AND MANAGED FOR THEIR NATURAL VALUES

"SEZ lands and associated riparian vegetation are scarce in the Basin relative to other plant communities. Because SEZ's provide many beneficial functions (especially pertaining to water quality) *only forest management practices, stream improvement programs, and habitat restoration projects are permissible uses.**

* * *

"5. *NEW DEVELOPMENT SHALL BE SITED OUTSIDE OF STREAM ENVIRONMENT ZONES*

"To prevent further loss of naturally-functioning stream environment zones, *no new development shall be permitted in stream environment zones except* (1) public works projects which satisfy the conditions set forth in policies 6 and 7; (2) man-modified stream environment zones which satisfy the conditions set forth in policy 8; (3)

---

* The three permitted "uses" are, for all practical purposes, public type environmental projects of no practical use or value to the owners of private property. "Forest management practices" includes only limited thinning of dead, diseased, or old trees, but does not permit commercial timber harvesting, nor is such timber harvesting a practical use of Plaintiffs' properties which are typically located in residential subdivisions are are [sic] much too small to have any commercial timber resource or potential.

replacement of existing coverage in conformance with policy 9; and (4) where such encroachment into stream environment zones provides the only feasible access to buildable private property for which all necessary building permits have been obtained and stream environment zone lands are restored in the amount of 1.5 times the area of stream environment zone which is disturbed or developed by the project. Site-by-site inspection shall be made for all project proposals in or near stream environment zones.

"10. DEVELOPMENT SHALL BE SET BACK FROM THE EDGE OF RIPARIAN VEGETATION

"A buffer strip outside of riparian vegetation will help protect the vegetation from disturbance. The edge between riparian zones and adjacent plant communities also is critical to the needs of many wildlife species. *The TRPA shall establish standards providing for a significant buffer around riparian vegetation contiguous to streams or other water bodies and providing for a smaller buffer or preservation policy for non-contiguous riparian vegetation.*" (Emphasis added.)

27. The foregoing restrictions are included in the Regional Plan allegedly to preserve and protect certain environmental resources and thus for the public's benefit. The practical effect of these provisions is to totally prohibit any new development or reasonable use on legally-created lots or parcels found to lie substantially in areas identified as so-called Stream Environment Zones. According to the Regional Plan, including the Regional Plan EIS, maps, and computerized data base, there are

approximately 2,900 acres in urbanized areas mapped as SEZ, and 3,500 vacant, privately-owned lots or parcels of record substantially (50% or more of the lot or parcel) within areas identified as a SEZ, including the lots or parcels owned by those named Plaintiffs identified in Paragraph 5 above, as more fully alleged in Appendices A and B hereto.

28. By virtue of the prohibitions and restrictions set forth in the Regional Plan, as alleged in Paragraphs 26 through 27 above, which Defendant TRPA is mandated to enforce by the Compact, and combined with the similar prohibitions and restrictions set forth in Ordinance No. 81.5 as alleged in Paragraph 21 above, those named Plaintiffs identified in Paragraph 5 above have been deprived of the entire practical, substantial, viable, beneficial, reasonable, economic and feasible use of their properties, there being no other lawful or authorized practical or reasonable use to which such properties can be put. Each parcel or lot owned by each named Plaintiff has unique characteristics, including the extent of on-site damage or disturbance already existing, the distance to a watercourse, the potential for stream degradation or man-caused erosion, the extent and type of existing vegetation, and the nature of the so-called stream or watercourse. Nevertheless, the prohibitions set forth in the Regional Plan provide no meaningful exceptions, alternatives, or variance procedure which Plaintiffs can pursue to obtain a reasonable use of their properties, nor any means of hearing or review to pursue or exhaust to determine whether or not a proposal to build would otherwise meet the environmental goals, policies, or environmental threshold carrying capacities adopted by

TRPA. Instead, the only remedy available to Plaintiffs is to challenge whether or not their properties are in fact correctly identified as being substantially within a so-called Stream Environment Zone, in which case the Regional Plan imposes an irrebuttable presumption that prohibits any building or development of a single-family home or other structure on said properties, and otherwise summarily precludes named Plaintiffs from receiving, and takes from them, the benefits for which they have been assessed and have paid, in the sewage collection and disposal systems, water systems, and other public improvements built to serve homes or other buildings to be constructed on their properties.

29. In spite of the foregoing direct prohibitions on the use of private lots or parcels of record located in SEZ areas, and in spite of the alleged environmental sensitivities of such SEZ areas, the Regional Plan specifically excepts from those prohibitions certain public works and public recreation projects located in such areas, as well as the reconstruction of existing public and private buildings and structures, provided they meet the criteria set forth in Policies 6, 7, and 9, Goal 1, of the "Stream Environment Zone Sub-Element" of the "Conservation Element" (pp. 100 & 101 of the Regional Plan).* Thus

---

* These exceptions permit construction of public outdoor recreation facilities (campgrounds, parking lots, etc.), public works projects such as roads, highways, bikepaths, parking lots, etc., and reconstruction of existing buildings, generally where there is no "reasonable alternative", where the impacts are "fully mitigated", and where stream-zone lands that have been disturbed are restored in an amount of 1.5 times the area to be disturbed.

while public parking lots, roads, and public buildings and facilities can be constructed on public properties within areas identified as Stream Environment Zones if they meet certain standards, the Regional Plan arbitrarily discriminates against Plaintiffs named in Paragraph 5 above who are precluded from using their similarly-situated private property for the relatively minor use of constructing a single-family home thereon, or other similar use, with no evidence showing that such uses would have any different or more substantial adverse environmental effect than those permitted on public properties.

30. As to all those legally-created vacant lots or parcels of record lying within so-called Land Capability Districts 1, 2, and/or 3 (a total of approximately 6,400, with approximately 5,650 situated 50% or more in said Districts 1, 2, and/or 3), including those lots or parcels owned by the named Plaintiffs identified in Paragraph 6 above and as specifically alleged in Appendices C and D hereto, the amended Regional Plan directly and specifically imposes a total and permanent prohibition on the further use or development of said lots or parcels as single-family homesites, or for any other practical and viable use, with a very minimal exception that theoretically would permit up to approximately 5% of the affected properties in the entire Lake Tahoe Basin to qualify for the right to construct a single-family home, but which in fact imposes a permanent construction prohibition on approximately 95% of the affected properties, including those of the Plaintiffs identified in Paragraph 6 above. Said permanent construction prohibition and restrictions are set forth in the "Soils Sub-Element" of the

"Conservation Element of the Plan", Goal 1, Policy 1, pages 88-90 of the Plan, which reads in pertinent part:

"POLICIES

"1. *NO NEW RESIDENTIAL, TOURIST, PUBLIC SERVICE RECREATION OR COMMERCIAL DEVELOPMENT SHALL BE PERMITTED ON LAND CAPABILITY DISTRICTS 1-3 EXCEPT AS NOTED IN THE FOLLOWING POLICY.*

"Development of environmentally sensitive lands in capability classes 1, 2, and 3 will not be permitted except as specified below. New development for purposes of this policy is development that creates additional land coverage. During this period (sic), TRPA will conduct a thorough evaluation of the environmental consequences of development in those areas, and of the options available to landowners, before deciding what policies should apply during later phases of the plan implementation. (Emphasis added)

"A. TRPA SHALL ESTABLISH A SINGLE-FAMILY RESIDENCE EVALUATION SYSTEM OR POINT PRIORITY SYSTEM, ON OR BEFORE JANUARY 1, 1985 (GOAL #1, POLICY #2, DEVELOPMENT AND IMPLEMENTATION SUBELEMENT). ON AUGUST 1, 1985, APPLICATIONS FOR SINGLE-FAMILY DWELLINGS IN LAND CAPABILITY LEVEL 3 MAY BE ACCEPTED FOR PROCESSING, UP TO 75 LOTS IN NEVADA AND 25 LOTS IN CALIFORNIA, WHICH MAY BE APPROVED FOR CONSTRUCTION AS OF MAY 1, 1986. ON AUGUST 1, 1986, APPLICATIONS FOR SINGLE-FAMILY DWELLINGS

ON LOTS MAPPED IN LAND CAPABILITIES 1-3 MAY BE ACCEPTED FOR PROCESSING, UP TO 75 LOTS IN NEVADA AND 25 IN CALIFORNIA, WHICH MAY BE APPROVED FOR CONSTRUCTION AS OF MAY 1, 1987. THIS SAME PROCEDURE WILL APPLY TO UP TO 75 LOTS IN NEVADA AND 25 LOTS IN CALIFORNIA WHICH MAY BE ACCEPTED ON AUGUST 1, 1987 AND APPROVED FOR CONSTRUCTION AFTER MAY 1, 1988.

"IF BY JANUARY 1, 1985, NO SINGLE-FAMILY RESIDENCE EVALUATION SYSTEM HAS BEEN ESTABLISHED, AND UPON DEMONSTRATION OF CONSISTENCY WITH THE THRESHOLDS AND WATER QUALITY OBJECTIVES, THE ABOVE PROCEDURE SHALL PROCEED WITH THE STANDARDS SET FORTH IN GOAL #1, POLICY #3, OF THE DEVELOPMENT AND IMPLEMENTATION SUBELEMENT, ENTITLED: 'DEVELOPMENT CRITERIA, MARCH 1982' UNTIL A SINGLE-FAMILY RESIDENCE EVALUATION SYSTEM IS ADOPTED OR UP TO FIVE YEARS FROM ADOPTION OF THE PLAN, AT WHICH TIME THIS PROVISION WILL EXPIRE.

"B. PUBLIC OUTDOOR RECREATION FACILITIES ARE PERMISSIBLE IN LAND CAPABILITY DISTRICTS 1-3 IF: (1) THE PROJECT IS A NECESSARY PART OF A PUBLIC AGENCY'S LONG RANGE PLANS

FOR PUBLIC OUTDOOR RECREATION; (2) THE PROJECT IS CONSISTENT WITH THE RECREATION ELEMENT OF THE REGIONAL PLAN; (3) THE PROJECT, BY ITS VERY NATURE MUST BE SITED IN A LAND CAPABILITY DISTRICT 1-3; (4) THERE IS NO FEASIBLE ALTERNATIVE WHICH WOULD REDUCE THE EXTENT OF ENCROACHMENT IN A LAND CAPABILITY DISTRICT 1-3; (5) THE IMPACTS ARE FULLY MITIGATED; AND (6) LAND CAPABILITY DISTRICT 1-3 LANDS ARE RESTORED IN THE AMOUNT OF 1.5 TIMES THE AREA OF LAND CAPABILITY DISTRICT 1-3 WHICH IS DISTURBED OR DEVELOPED BY THE PROJECT.

"To the fullest extent possible, recreation facilities must be sited outside of land capability districts 1-3. However, the six-part test established by the policy allows encroachment of these lands where such encroachment is essential for public outdoor recreation, and precautions are taker to ensure that such lands are protected to the fullest extent possible.

"C. PUBLIC WORKS PROJECTS ARE PERMISSIBLE USES IN LAND CAPABILITY DISTRICTS 1-3 IF: (1) THE PROJECT IS NECESSARY FOR PUBLIC HEALTH, SAFETY OR ENVIRONMENTAL PROTECTION; (2) THERE IS NO REASONABLE ALTERNATIVE, WHICH AVOIDS OR REDUCES THE EXTENT OF ENCROACHMENT IN LAND CAPABILITY DISTRICTS 1-3; (3) THE

IMPACTS ARE FULLY MITIGATED; AND (4) LAND CAPABILITY DISTRICTS 1-3 ARE RESTORED IN THE AMOUNT OF 1.5 TIMES THE AREA OF LAND CAPABILITY DISTRICT 1-3 WHICH IS DISTURBED OR DEVELOPED BY THE PROJECT.

"Development within land capability districts 1-3 is not consistent with the goals to manage high hazard lands for their natural qualities and shall generally be prohibited except under extraordinary circumstances involving public works. Each circumstance shall be evaluated based on the 4-prong test of this policy."

Additionally, Policy 4 of Goal 2 of the "Development and Implementation Priorities" Sub-Element of the Implementation Element, pages 126-127, provides:

"4. SUBJECT TO THE LIMITATIONS OF GOAL #1, POLICY #1, OF THE SOILS SUBELEMENT, *THERE SHALL BE A PROHIBITION OF DEVELOPMENT ON LAND CAPABILITY CLASSES 1-3 EXCEPT THAT NO MORE THAN 100 SINGLE FAMILY UNITS (25 in California and 75 in Nevada) OF THE RESIDENTIAL ALLOCATION RECEIVING A PASSING SCORE UNDER THE EVALUATION SYSTEM FOR ANY YEAR SHALL BE FOR RESIDENTIAL PERMITS OUTSIDE OF AREAS MAPPED AS LAND CAPABILITIES 4-7.* (Emphasis added.)

"This provision as set forth in the Soils Sub-Element, applies only to calendar years 1986, 1987, and 1988 of the allocation system and would stop unless it is extended by consent of the Board."

Further, under the complicated phased priority system established under Goal #1, Policies 1-3 of the foregoing Sub-Element of the Implementation Element (pp. 121-126), only new residential development in areas having the "characteristics of the Land Capability Classes 4-7", selected with an evaluation system yet to be created or adopted, are eligible for consideration for building, with all other proposals deferred to an indeterminate time in the future, which can be no earlier than five years after the adoption of the Plan, if at all, with only the vague promise that the Defendant TRPA will then review and possibly amend its development prohibitions on Land Capability Class 1, 2, and 3 areas.

31. The foregoing restrictions applicable to Land Capability Class 1, 2, and 3 areas are included in the Regional Plan allegedly to preserve and protect certain environmental resources. The practical effect of these prohibitions is to totally prohibit any "new development", with a *de minimis* exception amounting to not more than 5% of the affected lots or parcels, on legally-created lots or parcels found to lie in areas identified as within so-called Land Capability Districts 1, 2, and/or 3, including the lots or parcels owned by the named Plaintiffs identified in Paragraph 6 above, as more fully alleged and set forth in Appendices C and D hereto.

32. By virtue of those prohibitions set forth in Paragraphs 30 and 31 above, which prohibitions and restrictions Defendant TRPA is mandated to enforce by the Compact, and combined with the similar prohibitions and restrictions set forth in Ordinance No. 81-5, those Plaintiffs named in Paragraph 6 hereof have been deprived of

the entire practical, substantial, viable, beneficial, reasonable, economic and feasible use of their property, there being no other lawful or authorized practical or reasonable use to which such properties can be put. Further, the prohibitions summarily preclude Plaintiffs from receiving, and takes from them, the benefits for which they have been assessed and paid in the sewage collection and disposal systems, water systems, and/or other public improvements built to serve their properties. Further, the alleged exception allowing up to 75 lots in the State of Nevada and 25 lots in the State of California in Land Capability Class 3 areas are to be considered during 1985 for possible construction beginning on May 1, 1986, and an additional 100 lots (75 lots per year in Nevada and 25 lots in California) in Land Capability Classes 1, 2, and 3 during 1987 and 1988 respectively, offers such a statistically insignificant and *de minimis* chance that named Plaintiffs might qualify to use or build upon their property that it cannot be considered a viable or meaningful exception or variance to such prohibitions. Clearly such an exception gives only the bare appearance of fairness, while in fact the Regional Plan totally and permanently precludes any construction on or reasonable use of approximately 91% (not more than 225 out of approximately 2350 are potentially eligible for approval to build) of the remaining Class 1, 2, and 3 lawfully-created lots or parcels in the State of Nevada portion of the Lake Tahoe Basin including the properties owned by the Plaintiffs identified in Paragraph 6 above.

33. Further, although the Regional Plan specifies that there shall be a new "development evaluation system" created to review the extremely limited number of

Class 1, 2, and 3 lots or parcels that may qualify for the "alleged exception" to the foregoing prohibitions, that new evaluation system will not be in place if at all, until at least January 1, 1985. Further, it is not until August 1, 1985 that any applications to build on not more than a total of 100 Class 3 lots (75 in Nevada and 25 in California) can even be accepted for processing. The earliest possible "approval to build" for even those limited number of Class 3 lots is May 1, 1986, nearly five years after the initial moratorium was imposed on said Class 3 lots by TRPA through its Ordinance No. 81-5 as alleged in Paragraph 21 above. Further, applications to build on the handful of Class 1 and 2 lots permitted by the Regional Plan cannot even be accepted until at least August 1, 1986, with any building approved not to start until at least May 1, 1987, again extending the actual moratorium that has been in place since June 25, 1981. At the present time, neither the evaluation system nor any appeal process is currently available for Plaintiffs to pursue, and therefore they have no other administrative remedies to exhaust. Even when such procedures are established and available, Plaintiffs allege that such procedures will not constitute a meaningful and reasonable administrative process to pursue, in that, for the reasons set forth above, the process will be limited to such a statistically insignificant and *de minimis* number of potentially eligible properties that it will not provide a statistically-significant, realistic, and practical administrative remedy to Plaintiffs. Further, given the number of applicants who are potentially eligible to apply for limited exceptions during the "three-year window" that opens slightly commencing

in 1986, each of the named Plaintiffs identified in Paragraph 6 above believe they will be virtually precluded from qualifying to receive a development permit from the Defendant TRPA, by virtue of the statistically insignificant chance of successfully competing, and by virtue of the regulations Defendant TRPA proposes to implement, if at all, which will permit only those lots or parcels TRPA considers to be the "best lots or parcels" to ultimately qualify for this extremely limited exception. As a consequence, those Plaintiffs identified in Paragraph 6 above have been deprived of the entire practical, substantial, viable, beneficial, reasonable, economic and feasible use of their property, and have been precluded from enjoying the benefits of their rights in the sewage collection and disposal and/or water systems funded in part by assessments against their property.

34. In spite of the foregoing direct prohibitions on the use of private lots or parcels of record located in Class 1, 2, and 3 areas, and in spite of the alleged environmental sensitivity of such areas, the Regional Plan specifically exempts and excepts from said restrictions public works and public recreation projects, as well as reconstruction of existing buildings located in such areas, provided they meet the criteria set forth in Policies 1 B. and 1 C., and Policy 4, of Goal #1 of the "Soils Sub-Element" of the "Conservation Element" (pp. 88-90) of the Regional Plan. Thus, while public parking lots, bikepaths, roads and highways, and public buildings and facilities can be constructed on public properties, and existing "coverage" can be replaced with new buildings within Land Capability Districts 1, 2, and 3, those same criteria and exceptions are specifically made not applicable to the private

properties owned by the named Plaintiffs. Therefore said Regional Plan arbitrarily discriminates against those Plaintiffs identified in Paragraph 6 above who are precluded from using their similarly-situated private property for the relatively minimal use of constructing a single-family home thereon, or other similar use, with no showing that their construction activities, if required to conform to all BMP's and incorporate full mitigation measures to prevent or avoid erosion, will have a greater adverse impact, if any, than those public projects permitted on similarly-situated public lands.

VI. CLAIMS FOR RELIEF

Based on the foregoing factual allegations, and as further alleged in Appendices hereto, Plaintiffs seek the following relief from this Court:

FIRST CLAIM FOR RELIEF

(SEZ Properties – Declaratory and Injunctive Relief for Violation of Fifth and Fourteenth Amendment Protections Against Taking of Private Property Without Due Process of Law and Denial of Equal Protection)

35. Plaintiffs reallege and incorporate herein by reference all the allegations in Paragraphs 1 to 34 above.

36. As a result of enactment of the prohibitions and restrictions contained in the amended Regional Plan which on their face permanently prohibit any reasonable use of or new development on the legally-created lots or parcels within areas identified as Stream Environment Zones, and as a result of the interim moratorium applicable to SEZ properties enacted on June 25, 1981, Defendant

TRPA and Defendant Members of the TRPA Governing Board have deprived the named Plaintiffs identified in Paragraph 5 above of the entire practical, substantial, viable, beneficial, reasonable, economic, and feasible use of their respective properties without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. Such prohibitions and restrictions are grossly unfair, inequitable, and unreasonable, particularly in view of Plaintiffs' justifiable reliance upon the prior actions of the governmental entities alleged above in approving, authorizing, and zoning Plaintiffs properties so as to cause Plaintiffs reasonably to believe, and rely to their detriment on the fact, that their properties could be put to reasonable use as sites for single-family residences, or other reasonable uses. Due process of law has been denied in at least the following particulars:

A. Defendant TRPA's prohibitions and restrictions on the use of Plaintiffs' properties are oversweeping, oppressive, onerous, and unduly burdensome, and go well beyond those reasonable restrictions necessary to achieve the environmental protection sought to be attained by the Defendant TRPA, or to meet and achieve the environmental threshold carrying capacities adopted by the Defendant TRPA. Further, the blanket prohibitions do not permit such Plaintiffs the opportunity to propose and pursue other less onerous and more reasonable alternatives to achieve or meet the required environmental goals and environmental threshold carrying capacities, such as those alternatives previously provided under the 1971 Regional Plan, the 1978 Water Quality Management Plan, or those alternatives in the new Regional Plan available for public works and public recreation

projects and for construction of existing buildings in SEZ areas. Therefore, the permanent blanket prohibitions imposed by Defendant TRPA on the use of SEZ properties denies Plaintiffs due process of law.

B. The prohibitions create an irrebuttable presumption that such Plaintiffs' properties, once determined to be substantially in a so-called Stream Environment Zone, are therefore unbuildable and unusable, allegedly for the purpose of environmental protection, without affording such Plaintiffs the essential due process rights of individual notice, impartial hearing and determination, and a fair opportunity to demonstrate how they can make reasonable use of or safely build upon their properties while avoiding or substantially mitigating the alleged environmental consequences thereof.

C. The jurisdiction and authority of the TRPA is limited to that expressly granted by the Compact. The enactment of the prohibitions and restrictions complained of herein constitutes an action by the Defendant TRPA well in excess of the limited authority and jurisdiction either expressly granted, or intended to be granted, by the two Defendant States in the Compact. Further, half of the Defendant Members of the TRPA Governing Body are neither citizens nor representatives of the state in which Plaintiffs' properties are located. Nevertheless, such Members purport to exercise police power jurisdiction through their actions approving adoption of the Regional Plan which directly and summarily preclude any reasonable use or enjoyment of such Plaintiffs' properties. Such authority could not have been lawfully delegated or conferred upon such non-resident Members of the TRPA Governing Body by the respective Defendant States under the restraints and limitations imposed by the respective State Constitutions and by the

Compact Clause (Article I, Section 10, Cl. 3) of the Constitution of the United States. Therefore, Defendant TRPA and the Defendant Members of the TRPA Governing Body have acted in excess of the authority and jurisdiction vested in them by law in a manner that denies such Plaintiffs due process of law.

37. By enactment of those provisions contained in the amended Regional Plan permanently prohibiting any use or new development on those legally-created, privately-owned lots or parcels owned by Plaintiffs identified in Paragraph 5 above, merely because said lots or parcels are within areas identified as so-called Stream Environment Zones, while at the same time permitting public agencies owning public properties in the same SEZ's to proceed to construct public recreation facilities and public works projects provided they meet certain standards, and permitting public and private owners of existing structures in SEZ areas to rebuild or reconstruct new buildings in such SEZ's, provided the "impacts are fully mitigated" and the disturbed area restored elsewhere in an amount of 1.5 times the amount of the area of the new disturbance, the Defendant TRPA has arbitrarily, capriciously, and discriminatorily placed the owners of similarly-situated private property into a classification that precludes any reasonable use of their properties in a manner that denies Plaintiffs the equal protection of the laws.

38. For the reasons set forth hereinabove, an actual constroversy exists between the Plaintiffs and Defendant TRPA and Defendant Members of the TRPA Governing

Body related to their respective legal rights and obligations. Plaintiffs contend that the aforementioned provisions of the Regional Plan and TRPA's interim Ordinance No. 81-5 have totally deprived the named Plaintiffs identified in Paragraph 5 above of their private property in violation of the Fifth and Fourteenth Amendments to the Constitution without due process of law and have denied them equal protection of the laws and such Defendants contend to the contrary. The SEZ Plaintiffs have suffered and will continue to suffer irreparable injury as a result of such Defendants' actions and such Plaintiffs have no other reasonable administrative remedy to pursue. Plaintiffs therefore seek appropriate declaratory and injunctive relief as prayed for hereafter determining that the actions of such Defendants constitute a deprivation of their private property without due process of law, and a denial to them of the equal protection of the laws, within the meaning of the Fifth and Fourteenth Amendments to the Constitution, declaring the prohibitions and restrictions to be invalid and unconstitutional, and restraining and prohibiting the Defendant TRPA and the Defendant Members of the Governing Body from enforcing the prohibitions and restrictions applicable to SEZ properties complained of herein.

SECOND CLAIM FOR RELIEF

(SEZ Properties – Damages for Violation of Fifth and Fourteenth Amendment Protections Against Taking Private Property Without Just Compensation)

39. Plaintiffs reallege and incorporate herein by this reference all of the allegations in Paragraphs 1 to 38 above.

40. The enactment by the Defendant TRPA of those provisions in its Regional Plan prohibiting all reasonable use of those legally-created lots or parcels within areas identified as so-called Stream Environment Zones, as alleged in greater detail in Paragraphs 26 through 29 above, coupled with the interim moratorium enacted by the Defendant TRPA on June 25, 1981 applicable to Stream Environment Zone properties as alleged in greater detail in Paragraph 21 above, on their face have permanently, directly, and totally deprived, confiscated, and taken the private properties of each named Plaintiff identified in Paragraph 5, and have deprived such Plaintiffs of all practical, viable, beneficial, reasonable and feasible use of their properties, and have made their properties virtually unmarketable and of no value to such Plaintiffs, without any compensation therefor, all in the name of environmental protection and hence for public use and benefit, and therefore in direct violation of the Fifth and Fourteenth Amendments to the Constitution.

41. For the reasons set forth hereinabove, an actual controversy exists between such Plaintiffs and Defendants related to their respective legal rights and obligations. Those Plaintiffs identified in Paragraph 5 above allege that the aforementioned provisions of the Defendant TRPA's Regional Plan applicable to privately-owned properties in SEZ areas constitute an unconstitutional taking and confiscation of their properties in violation of the Fifth and Fourteenth Amendments to the Constitution, and Defendants contend to the contrary. Such Plaintiffs have suffered and will continue to suffer irreparable injury as a result of Defendants' actions, and they have no other reasonable administrative remedy to pursue.

Such Plaintiffs therefore seek appropriate declaratory relief determining that the actions of the Defendants complained of above constitute a taking of such Plaintiffs' private properties within the meaning of the Fifth and Fourteenth Amendments to the Constitution. Further, such Plaintiffs seek the award of just compensation as required by the Fifth and Fourteenth Amendments in an amount equal to the fair market value of such Plaintiffs' properties on the date they were totally taken for public use, which such Plaintiffs allege was June 25, 1981, the date Defendant's initial moratorium was imposed by its Ordinance No. 81-5, or such pro rata amount determined to be just compensation extending from the effective date of the taking until the date this Court determines such prohibitions are invalid, or the date the Defendant TRPA acts to rescind or amend the prohibitions, which amount shall be determined based upon proof submitted at trial applicable to each of such Plaintiffs' properties.

42. Defendants State of Nevada and State of California created the TRPA through the enactment of the Compact and the 1980 Amendments thereto, and purported to delegate their sovereign authority and responsibilities to the TRPA without apparent limitation or control. Representatives of each Defendant State constitute the majority of the TRPA Governing Body which took the actions complained of herein. Each Defendant State apparently countenances the restrictions and prohibitions imposed by TRPA as evidenced by each State's failure to initiate or adopt legislation withdrawing from the Compact or otherwise limiting the jurisdiction or powers of the TRPA. The Defendant States are obligated to provide funding and have been providing funding for the activities and

operations of TRPA. In view of the foregoing facts, the Defendant States are sued herein as jointly liable for the damages created as a result of the unconstitutional taking of the Plaintiffs' properties alleged herein by virtue of the prohibitions and restrictions imposed by the Defendant TRPA.

THIRD CLAIM FOR RELIEF

(Class 1, 2, and/or 3 Properties – Declaratory and Injunctive Relief for Violation of Fifth and Fourteenth Amendment Protections Against Taking of Private Property Without Due Process of Law)

43. Plaintiffs reallege and incorporate herein by this reference all of the allegations in Paragraphs 1 through 34 above.

44. As a result of enactment of the prohibitions and restrictions contained in the amended Regional Plan which on their face permanently prohibit any reasonable use of, or new development on, those legally-created lots or parcels within areas designated as Class 1, 2, and/or 3 Land Capability Districts, and as a result of the interim moratorium applicable to such properties enacted on June 25, 1981, Defendant TRPA and Defendant Members of the TRPA Governing Body have deprived the named Plaintiffs identified in Paragraph 6 above of the entire practical, substantial, viable, beneficial, reasonable, economic, and feasible use of their respective properties without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. Such prohibitions and restrictions are grossly unfair, inequitable, and unreasonable, particularly in view of Plaintiffs' justifiable reliance upon the prior

actions of the governmental entities alleged above in approving, authorizing, and zoning Plaintiffs' properties so as to cause Plaintiffs reasonably to believe, and rely to their detriment on the fact, that their properties could be put to reasonable use as sites for single-family residences, or other reasonable uses. Due process of law has been denied in at least the following particulars:

A. Defendant TRPA's prohibitions and restrictions on the use of such Plaintiffs' properties are oversweeping, oppressive, onerous, and unduly burdensome, and go well beyond those reasonable restrictions necessary to achieve the environmental protection sought to be attained by the Defendant TRPA, or to meet and achieve the environmental threshold carrying capacities adopted by the Defendant TRPA. Further, the blanket prohibitions do not permit such Plaintiffs the opportunity to propose and pursue other less onerous alternatives which will achieve or meet the same required environmental threshold carrying capacities, such as those previously provided under the 1971 Regional Plan, those provided on a limited basis for certain Nevada properties under Ordinance No. 81-5, or those alternatives available for public works and public recreation projects and for reconstruction of existing buildings in the new Regional Plan. Therefore, Defendant TRPA's permanent blanket prohibition on the use of Class 1, 2, and/or 3 properties denies Plaintiffs due process of law.

B. Defendant TRPA's total prohibition on the use of such Plaintiffs' properties, merely because they are found to lie within a so-called Class 1, 2, and/or 3 District, creates an irrebuttable presumption that such Plaintiffs' properties, once determined to be substantially in a Land Capability District 1, 2, and/or 3, are therefore

unbuildable and unusable, allegedly for the purpose of environmental protection to prevent soil erosion. Such process denies Plaintiffs the essential due process rights of individual notice, impartial hearing and determination, and a fair opportunity to demonstrate how they can safely build upon or make reasonable use of their properties while avoiding or substantially mitigating the alleged environmental consequences thereof.

C. The jurisdiction and authority of the TRPA is limited to that expressly granted by the Compact. The enactment of the prohibitions and restrictions complained of herein constitutes an action by the Defendant TRPA well in excess of the limited authority and jurisdiction either expressly granted, or intended to be granted, by the two Defendant States in the Compact. Further, half of the Defendant Members of the TRPA Governing Body are neither citizens nor representatives of the state in which Plaintiffs' properties are located. Nevertheless, such Members purport to exercise police power jurisdiction through their actions approving adoption of the Regional Plan which directly and summarily precludes any reasonable use or enjoyment of such Plaintiffs' properties. Such authority could not have been lawfully delegated or conferred upon such non-resident Members of the TRPA Governing Body by the respective Defendant States under the restraints and limitations imposed by the respective State Constitutions and by the Compact Clause (Article I, Section 10, Cl. 3) of the Constitution of the United States. Therefore, Defendant TRPA and the Defendant Members of the TRPA Governing Body have acted in excess of the authority and jurisdiction vested in them by law in a manner that denies such Plaintiffs due process of law.

45. For the reasons set forth above, an actual controversy exists between the Plaintiffs and Defendant TRPA and Defendant Members of the TRPA Governing Body related to their respective legal rights and obligations. Plaintiffs contend that the aforementioned provisions of the Regional Plan, and TRPA's interim Ordinance No. 81-5, have totally deprived the named Plaintiffs identified in Paragraph 6 above of their private property in violation of the Fifth and Fourteenth Amendments to the Constitution without due process of law, and Defendants contend to the contrary. Such named Plaintiffs have and will continue to suffer irreparable injury as a result of such Defendants' actions and have no other practical, reasonable, and effective administrative remedy to pursue for the reasons set forth in Paragraphs 31 through 33 above. Such Plaintiffs therefore seek appropriate declaratory and injunctive relief as prayed for hereafter determining that the actions of such Defendants complained of above constitute a deprivation of their private property without due process of law within the meaning of the Fifth and Fourteenth Amendments of the Constitution, declaring the prohibitions and restrictions to be invalid and unconstitutional, and restraining and prohibiting the Defendant TRPA, and the Defendant Members of the Governing Body, from enforcing the prohibitions and restrictions applicable to Class 1, 2, and 3 properties complained of herein.

FOURTH CLAIM FOR RELIEF

(Class 1, 2, and/or 3 Properties – Declaratory and Injunctive Relief for Violation of Constitutional Protection Against Denial of Equal Protection)

46. Plaintiffs reallege and incorporate herein by reference the allegations in Paragraphs 1 through 34 and 43 through 45 above.

47. The enactment of the prohibitions and restrictions contained in the amended Regional Plan permanently prohibiting any reasonable use of, or new development on, those legally-created lots or parcels within areas designated as Class 1, 2, or 3 Land Capability Districts, coupled with the provisions of the interim moratorium enacted by the Defendant TRPA on June 25, 1981, arbitrarily, capriciously and inequitably discriminate against those Plaintiffs identified in Paragraph 6 above in a manner denying them the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution in at least the following particulars:

A. By the enactment of those provisions contained in the amended Regional Plan permanently prohibiting any use or new development on those legally-created, privately-owned lots or parcels owned by such Plaintiffs, merely because their lots or parcels are identified as being within a so-called Land Capability 1, 2, and/or 3 District, while at the same time permitting the owners of other already built Class 1, 2, or 3 properties to continue to add on, remodel, and change the configurations of homes and buildings on their properties, and otherwise make full use and enjoyment of their properties, and while at the same time permitting public agencies owning public properties in said Class 1, 2, or 3 areas to proceed to construct public recreation facilities and public works projects provided they meet certain standards designed to mitigate and offset the alleged environmental impacts, Defendant TRPA has arbitrarily discriminated against each

of those Plaintiffs identified in Paragraph 6 above.

B. To the extent that the prohibitions adopted by the Defendant TRPA applicable to those Plaintiffs owning properties in areas identified as Class 1, 2, or 3 purport to allow a meager exception of up to 100 single-family homes per year to be reviewed and approved for building starting in 1986, and continuing for a three-year period thereafter, and to the extent such exception provides for up to 75 of those homes to be approved in the State of Nevada and for up to 25 of those homes to be approved in the State of California each year, Defendant TRPA has created an arbitrary and capricious classification based solely on the geographical jurisdiction in which such properties lie, and has totally failed to demonstrate any reasonable or rational basis for such distinction based on factors within the land use and environmental planning jurisdiction of the Defendant TRPA. Accordingly, those provisions of the Regional Plan setting forth such artificial distinctions between the owners of property in the State of California and the owners of property in the State of Nevada on their face discriminate between property owners in an arbitrary and capricious manner that denies such property owners the equal protection of the laws.

C. To the extent that the prohibitions adopted by the Defendant TRPA applicable to Class 1, 2, and 3 properties deny the owners thereof any reasonable use of their property merely because of such classification, and in many cases merely because the slope of their property is one or two percent greater than the slope of those properties that are otherwise authorized to be built upon in Class 4 through 7 areas, and to the extent that such classifications are not based upon an individual site inspection of each of Plaintiffs' properties so

that such classifications take into account all relevant factors applicable to Plaintiffs' individual properties such as the nature and extent of vegetation, nearness to the Lake or watercourse, the degree of existing disturbance, access, potential soil erosion that may in fact occur, and other related factors, such classification is an arbitrary, discriminatory and unnecessarily broadbrush classification that denies such Plaintiffs all reasonable use of their properties in a manner denying them the equal protection of the laws.

D. Despite the fact that both Land Capability Class 3 and Class 4 properties are identified in the "Bailey Report" described in Paragraph 15 above as being so-called "Moderate Hazardous Lands" that "are suited for low density housing use", the Regional Plan precludes any reasonable use of those properties within a Land Capability 3 District, while at the same time permitting those properties identified as being within a land Capability 4 District to be built upon. Defendant TRPA has therefore arbitrarily and capriciously discriminated against those owners of properties in Land Capability District 3, identified in Paragraph 6 above, as compared to those in Land Capability District 4, in a manner that is not justified under the application of the "Bailey system" or under any other reasonable or rational basis, and therefore has discriminated against such Plaintiffs owning Class 3 lots or parcels in a manner denying them the equal protection of the laws.

49. For the reasons set forth above, an actual controversy exists between the Plaintiffs and Defendant TRPA and Defendant Members of the TRPA Governing Body relating to their respective legal rights and obligations. Plaintiffs contend that the aforementioned provisions of the Regional Plan and TRPA's interim Ordinance No. 81-5

have totally deprived the named Plaintiffs identified in Paragraph 6 above of their private property in a manner that denies them the equal protection of the laws, and such Defendants contend to contrary. Such Plaintiffs have suffered and will continue to suffer irreparable injury as a result of such Defendants' actions, and have no other practical, reasonable, and effective administrative remedy to pursue for the reasons set forth in Paragraphs 31 through 33 above. Such Plaintiffs therefore seek appropriate declaratory and injunctive relief as prayed for hereafter determining that the actions of such Defendants complained of above constitute a deprivation of their private property in a manner that denies them the equal protection of the laws guaranteed to them by the Constitution, declaring the prohibitions and restrictions to be invalid and unconstitutional, and restraining and prohibiting the Defendant TRPA, and the Defendant Members of the Governing Body, from enforcing the prohibitions and restrictions applicable to Class 1, 2, 3 properties complained of herein.

FIFTH CLAIM FOR RELIEF

(Class 1, 2, and 3 Properties – Damages for Violation of Fifth and Fourteenth Amendment Protections Against Taking Private Property Without Just Compensation)

49. Plaintiffs reallege and incorporate herein by this reference all of the allegations in Paragraphs 1 through 34 and 43 through 48 above.

50. The enactment by the Defendant TRPA of those prohibitions and restrictions contained in the amended Regional Plan permanently prohibiting any use or new development on those legally-created lots or parcels

within areas identified as so-called Land Capability Classes 1, 2, and/or 3, as alleged in greater detail in Paragraphs 30 through 34 above, coupled with the provisions of the interim moratorium enacted by the Defendant TRPA as alleged in greater detail in Paragraph 21 above, on their face have permanently, directly and totally deprived, confiscated, and taken the private properties of each named Plaintiff identified in Paragraph 6 above, by unreasonably and unnecessarily depriving such Plaintiffs of all of their practical, viable, beneficial, reasonable, and feasible use of their properties, and making them virtually unmarketable and of no value to such Plaintiffs, without any compensation therefor, all in the name of environmental protection and hence allegedly for public use and benefit, and therefore in direct violation of the Fifth and Fourteenth Amendments to the Constitution.

51. For the reasons set forth above, an actual controversy exists between Plaintiffs and Defendants related to their respective legal rights and obligations. Those Plaintiffs identified in Paragraph 6 above allege that the aforementioned provisions of the Regional Plan applicable to Class 1, 2, and 3 properties constitute an unconstitutional taking of their properties in violation of the Fifth and Fourteenth Amendments to the Constitution, and Defendants contend to the contrary. Such Plaintiffs have and will continue to suffer irreparable injury as a result of Defendants' actions and have no other reasonable administrative remedy to pursue for the reasons set forth in Paragraphs 31 through 33 above. Such Plaintiffs therefore seek appropriate declaratory relief as prayed for hereafter and a judgment determining that the actions of the

Defendants complained of above constitute a taking of such Plaintiffs' private property within the meaning of the Fifth and Fourteenth Amendments of the Constitution. Further, such Plaintiffs seek the award of just compensation as required by the Fifth and Fourteenth Amendments in an amount equal to the fair market value of such Plaintiffs' properties on the date they were totally taken for public use, which Plaintiffs allege is June 21, 1981, the date Defendant's initial moratorium was imposed by Ordinance No. 81-5, or such pro rata amount determined to be just compensation extending from the effective date of the taking until the date that this Court determines the prohibitions are invalid, or the date the Defendant TRPA acts to rescind or amend the prohibitions, which amounts shall be determined based upon the proof submitted at trial applicable to each of such Plaintiffs' properties.

52. Defendants State of Nevada and State of California created the TRPA through the enactment of the Compact and the 1980 Amendment thereto, and purported to delegate their sovereign authority and responsibilities to the TRPA without apparent limitation or control. Representatives of each Defendant State constitute the majority of the TRPA Governing Body which took the actions complained of herein. Each Defendant State apparently countenances the restrictions and prohibitions imposed by TRPA, as evidenced by each State's failure to initiate or adopt legislation withdrawing from the Compact or otherwise limiting the jurisdiction or power of the TRPA. The Defendant States are obligated to provide funding and have been providing funding for the activities and operations of TRPA. In view of the foregoing facts, the

Defendant States are each sued herein as jointly liable for the damages created as a result of the unconstitutional taking of such Plaintiffs' property by virtue of the prohibitions and restrictions imposed by the Defendant TRPA.

SIXTH CLAIM FOR RELIEF

(Deprivation of Plaintiffs' Rights To Receive The Benefits of Special Public Improvements (Sewage Collection, Water Service, etc.) for Which They Have Been Assessed and Paid)

53. Plaintiffs reallege and incorporate herein by reference all of the allegations contained in Paragraphs 1 to 34 above.

54. As alleged above, the properties of each of those named Plaintiffs identified in Paragraphs 5 and 6 above, and as further alleged with particularity in Appendices A, B, C, and D above, lie within the boundaries of various public improvement districts, formed and created under the applicable laws of the State of Nevada in part for the purpose of assessing or charging Plaintiffs for their pro rata share of the costs of providing certain specific public improvements to service homes or other structures to be built upon their individual lots or parcels. Said public improvements include sewage collection and treatment facilities, water service facilities, and in some cases road improvements, all as more particularly alleged in Appendices A, B, C, and D hereto, which special public improvements will provide an actual benefit to Plaintiffs' properties only in the event Plaintiffs are permitted to construct a single-family home thereon, or make other reasonable use of their properties. The named Plaintiffs, as alleged with particularity in Appendices A through D

hereto, have been assessed and paid their pro rata share of the cost of construction of such public improvements (including principal and interest) with the full expectation, and reliance upon the fact, that at such time as Plaintiffs proceed to build a home, or make other reasonable use of their property, each Plaintiff will have the right to receive the benefits for which they have paid, including sewage collection and treatment service and fresh water service.

55. As a result of the actions of the Defendant TRPA, acting pursuant to the authority allegedly granted to it by the Defendant States and in concert with them, by imposing those prohibitions in its Regional Plan complained of above which prohibit Plaintiffs from making any reasonable or practical use of their properties, or from building thereon any structure which can utilize those sewage collection/treatment and water service facilities, and other similar public improvements, for which Plaintiffs have previously been assessed and paid their pro rata share, the Defendants have acted in a grossly unfair and inequitable manner so as to intentionally cause the named Plaintiffs to be totally denied their right to make any reasonable or practical use of their property, or to enjoy their contractual right to use or benefit from the public improvements for which they have previously been assessed and paid, all in a manner which denies Plaintiffs due process and the equal protection of the laws, in violation of Article I, Section 10 and the Fifth and Fourteenth Amendments to the Constitution.

56. Further, the actions of the Defendant TRPA, acting in concert with the Defendant States, in prohibiting

the Plaintiffs from building a single-family home or any other structure on their property, have directly, intentionally, and permanently taken from Plaintiffs a valuable property right, including those sums previously assessed against and paid by Plaintiffs for those public improvements specifically constructed to serve homes or buildings to be constructed on their properties, all in a manner denying Plaintiffs the due process of law, and without any compensation therefor, and thus in violation of the Fifth and Fourteenth Amendments to the Constitution.

57. For the reasons set forth above, an actual controversy exists between Plaintiffs and Defendants related to their respective legal rights and obligations. Those Plaintiffs identified in Paragraphs 5 and 6 above, and as further alleged in Appendices A, B, C, and D above, who have had their property assessed for the public improvements described hereinabove, for which they are now precluded by the actions of Defendants from receiving any benefit whatsoever, contend that the aforementioned actions of the Defendants have totally deprived them of their private property without due process of law, in a manner denying them the equal protection of the laws, and without just compensation therefor. Plaintiffs further contend that the actions of Defendants have intentionally and unlawfully impaired the obligation of their contractual right to receive the benefits for which they have been assessed and paid in violation of Article I, Section 10 of the Constitution. Defendants contend to the contrary. Such Plaintiffs have and will continue to suffer irreparable injury as a result of Defendants' actions, and they have no other reasonable administrative remedy to pursue. Such Plaintiffs therefore seek appropriate

declaratory, injunctive, and other equitable relief prohibiting and estopping Defendants from taking any actions which cause, or will cause, such Plaintiffs to be denied the right to receive the benefits in the public improvements for which they have been assessed and paid. In the alternative, such Plaintiffs seek an appropriate declaratory judgment determining that the actions of Defendants constitute a taking of such Plaintiffs' property in violation of the Fifth and Fourteenth Amendments to the Constitution, and the award of just compensation in an amount equal to the amount of the assessments (principal and interest) previously paid by each Plaintiff, or their predecessors in interest, for those public improvements intended to service the homes or other structures to be built on Plaintiffs' properties, or such pro rata amount determined to be just compensation extending from the effective date of the taking until this Court determines the prohibitions are invalid, or the date the Defendant TRPA acts to rescind or amend its prohibitions so that the Plaintiffs are free to realize the benefits for which they have paid, which amounts shall be determined based upon the proof submitted at trial applicable to each Plaintiff's property.

58. Defendants State of Nevada and State of California required the exportation of sewage wastes from the Lake Tahoe Basin as more specifically alleged in Paragraphs 10 B. and C. and 14 above; both adopted the legal requirements by which Plaintiffs' properties were initially assessed or taxed for the purpose of constructing public improvements to service those properties; both are parties to and created the TRPA through the enactment of the Compact and the 1980 Amendments thereto; and both

Defendant States purported to delegate their sovereign authority and responsibilities to the Defendant TRPA, which in turn, is now precluding Plaintiffs from enjoying the benefits of the public improvements for which they have previously been assessed and paid. The representatives of each State constitute the majority of the TRPA Governing Body which has taken the actions complained of herein. In view of the foregoing facts and the Defendant States' obligation to provide funding, and the fact each has been providing actual funding, for the activities and operations of TRPA, each of the Defendant States are, therefore, sued herein as jointly liable for the damages created as a result of the unconstitutional taking of Plaintiffs' property alleged hereinabove.

SEVENTH CLAIM FOR RELIEF

(Violation of the Federal Civil Right's Act – 42 U.S.C. 1983 and 1985)

59. Plaintiffs reallege and incorporate herein by this reference all of the allegations in Paragraphs 1 through 58 above.

60. Defendant TRPA, and each Defendant member of its Governing Body, acting in their official capacities and under color of State law, and in concert with the Defendant States as alleged above, by virtue of their adoption of those provisions of the Regional Plan complained of above as well as the enactment of those interim moratoria alleged in Paragraphs 21 and 23 above, which actions have precluded the named Plaintiffs identified in Paragraphs 5 and 6 above from making any practical,

viable, beneficial, feasible or reasonable use of their private properties, have caused Plaintiffs to be deprived of their rights and privileges secured by the Constitution, and particularly their right not to be deprived of their property without due process of law, their right not to have their property taken without just compensation, and their right to equal protection of the laws, all as more specifically alleged in each of the foregoing Claims for Relief. As a direct result of Defendants' actions, which actions constitute an intentional and purposeful denial of Plaintiffs' rights protected and guaranteed to them by the Constitution, each named Plaintiff has suffered substantial personal damages, in the amount to be determined based upon the proof to be submitted at trial. Accordingly, pursuant to the provisions of 42 U.S.C. 1983 and 1985(3), Plaintiffs, and each of them seek appropriate injunctive and declaratory relief and damages against Defendants as prayed for hereafter.

WHEREFORE, Plaintiffs pray for relief as follows:

1. On the FIRST CLAIM FOR RELIEF, for an order and judgment of the Court declaring that the provisions of the Regional Plan totally prohibiting those Plaintiffs owning properties designated as within a SEZ area from making any reasonable or practical use of their properties, including specifically those provisions identified and set forth in Paragraph 26 of the Complaint, are unconstitutional and null and void; and for an order permanently enjoining the Defendant TRPA, the Defendant Members of its Governing Body, and their agents and employees from enforcing or attempting to enforce those prohibitions against Plaintiffs.

2. On the SECOND CLAIM FOR RELIEF, for a determination and declaration by the Court that the prohibitions and restrictions adopted by the Defendant TRPA totally prohibiting and precluding those Plaintiffs owning properties in areas designated as SEZ's from making any reasonable or practical use of their property, and prohibiting any building or development thereon, including specifically those provisions identified and set forth in Paragraph 26 of the Complaint, constitute an unconstitutional taking of such Plaintiffs' properties within the meaning of the Fifth and Fourteenth Amendments to the Constitution; and for an award of damages against Defendant TRPA and the Defendant States to provide just compensation for the taking of such Plaintiffs' properties in an amount to be determined upon the basis of proof submitted at trial, or before a Master or Commission as shall be appointed by the Court, plus interest thereon from the effective date of the taking, in the manner to be determined in accordance with Paragraph 41 of the Complaint, which amount Plaintiffs are informed and believe aggregates not less than $5,476,800.00.

3. On the THIRD AND FOURTH CLAIMS FOR RELIEF, for an order and judgment of the Court declaring that the provisions of the Regional Plan totally prohibiting and precluding those Plaintiffs owning properties in Class 1, 2, and/or 3 Land Capability Districts from making any reasonable or practical use of their property, or prohibiting them from building or constructing any structures thereon, including specifically those provisions identified and set forth in Paragraph 30 of the Complaint, are unconstitutional and null and void; and for an order

permanently enjoining Defendant TRPA and the Defendant Members of its Governing Body, and their agents and employees from enforcing or attempting to enforce such prohibitions against Plaintiffs.

4. On the FIFTH CLAIM FOR RELIEF, for a determination and declaration by the Court that the prohibitions and restrictions adopted by the Defendant TRPA totally prohibiting and precluding those Plaintiffs owning properties in areas designated within Class 1, 2, and/or 3 Land Capability Districts from making any reasonable or practical use of their property, and prohibiting any building or development thereon, including specifically those provisions identified and set forth in Paragraph 30 of the Complaint, constitute an unconstitutional taking of such Plaintiffs' properties within the meaning of the Fifth and Fourteenth Amendments of the Constitution; and for an award of damages against the Defendant TRPA and Defendant States to provide just compensation in an amount to be determined upon the basis of proof submitted at trial, or before a Master or Commission as shall be appointed by the Court, plus interest thereon from the effective date of the taking, in the manner to be determined in accordance with Paragraph 51 of the Complaint, which amount Plaintiffs are informed and believe aggregates not less than $10,171,200.00

5. On the SIXTH CLAIM FOR RELIEF, for an order and judgment of the Court declaring that the provisions of Defendant TRPA's Regional Plan which totally preclude the named Plaintiffs from receiving the benefits, for which they have been assessed and paid, from the public improvements installed to serve homes or other buildings to be constructed on their properties, are grossly unfair,

inequitable, and deny the named Plaintiffs due process of law, and enjoining Defendant TRPA, and the Defendant Members of its Governing Body, from enforcing said provisions in such a manner as to preclude named Plaintiffs from receiving the benefits for which they have previously been assessed and paid; or, in the alternative, for an award of damages against the Defendant TRPA and Defendant States to provide just compensation in an amount to be determined on the basis of the proof submitted at trial, or before a Master or Commission as shall be appointed by the Court, plus interest thereon from the effective date of taking, to be computed in the manner set forth in Paragraph 57 of the Complaint, which amount Plaintiffs are informed and believe aggregates not less than $1,722,000.00

6. On the SEVENTH CLAIM FOR RELIEF, for an order and judgment of the Court declaring that the provisions of the Regional Plan complained of herein, as well as the interim moratoria alleged in Paragraphs 21 and 23 above, have caused Plaintiffs to be deprived of their rights and privileges secured by the Constitution, particularly their right not to be deprived of their property without due process of law, their right not to have their property taken without just compensation, and their right to equal protection of the laws; for an order and judgment declaring that the provisions of the Regional Plan totally prohibiting and precluding the named Plaintiffs identified in Paragraphs 5 and 6 above from making any reasonable or practical use of their properties, all as complained of above, are unconstitutional and null and void; for an order permanently enjoining Defendant TRPA, and the Defendant Members of its Governing Body, and their

agents and employees from enforcing or attempting to enforce the prohibitions against Plaintiffs in the manner set forth hereinabove; and for an award of damages against the Defendant TRPA and the Defendant States to provide just compensation for the taking of the named Plaintiffs' properties in an amount to be determined upon the basis of proof submitted at trial, or before a Master or Commission as shall be appointed by the Court, plus interest thereon from the effective date of the taking, in the manner to be determined in accordance with Paragraphs 41, 51, and 57 of the Complaint, which amount Plaintiffs believe aggregates not less than $17,370,000.00.

7. For costs of suit.

8. For reasonable attorneys' fees, recoverable under the provisions of 42 U.S.C. Section 1988, 42 U.S.C. Section 4654, and other applicable laws.

9. For such other relief as this Court deems proper and just.

Dated: June 25, 1984.

HOFFMAN, LIEN, FACCINTO & SPITZER

/s/ Robert Damon Spitzer
Robert Damon Spitzer
Attorneys for Plaintiffs

SAMPLE OF TWO
APPENDICES TO COMPLAINT

APPENDIX NO. A-2
PLAINTIFFS ALFRED A. AVEY and SHERYL AVEY

1. Plaintiffs ALFRED A. AVEY and SHERYL AVEY are the owners of that certain single-family residential lot commonly known as Lot No. 67, Fairway Estates Unit No. 1, described as Washoe County Assessor Parcel No. 124-121-26, and located in the unincorporated portion of Washoe County, State of Nevada. Plaintiffs ALFRED A. AVEY and SHERYL AVEY are citizens of the State of Washington, and currently permanently reside at 40819 236 Avenue, S.E., Enumclaw, Washington. The Fairway Estates Unit #1 subdivision, in which Plaintiffs' lot is located, is a previously legally-approved subdivision, approximately 80% built-out in the area neighboring Plaintiffs' lot, currently served by paved roads, sewers, water, electricity, and other utilities. Plaintiffs' lot fronts on Third Creek Court, a paved County road within said subdivision.

2. Plaintiffs purchased said lot in 1978, and since that date have timely paid all property taxes when due, and those public assessments for bonds used to fund and construct sewer and water facilities to serve said lot, including but not limited to those constructed by the Incline Village General Improvement District. Said assessment obligations are inclusive of, but not limited to, the sum of $7,684.83, plus interest, yet to be fully paid for improvements in said districts. Comparable lots in the same neighborhood as Plaintiffs' lot have a fair market value of approximately $120,000.00 if they can be utilized as single-family homesites. Plaintiffs purchased their lot for the purpose of residential development, and desire to

be able to use said lot, at a time of their choosing, for that purpose.

3. The use of Plaintiffs' lot as a single-family homesite is permitted under applicable zoning of the County of Washoe, and Defendant TRPA's new Regional Plan has designated the Fairway Estates Unit #1 subdivision as a residential area allowing for new single-family residential housing, and continuation of existing residential development. Because of its location in an existing residential subdivision, the applicable local zoning, and other restrictions contained in TRPA's Regional Plan, there are no other reasonable, practical, viable or feasible uses to which Plaintiffs can put their property except the construction of a single-family home.

4. Plaintiffs' lot is shown on the TRPA Regional Plan Maps (Map No. H-3 attached hereto), and/or in the computerized date base of the TRPA, as being at least 96% within a Stream Environment Zone. Based upon said classification, and in view of the prohibitions and restrictions contained in TRPA's Regional Plan and TRPA's Ordinance 81-5, as more particularly set forth in this Complaint, Plaintiffs are prohibited and precluded from using their property to build a single-family home, or undertaking any other development or building on said real property, thereby depriving Plaintiffs of substantially all reasonable and practical use of their property, making said property virtually unmarketable, and denying and taking all of the special benefits paid for by Plaintiffs in connection with those special assessments levied against said property to pay for sewer and water improvements to serve said property.

APPENDIX No. D-1
PLAINTIFFS ROBERT W. ALEXANDER and
MARIA G. ALEXANDER

1. The Plaintiffs ROBERT W. ALEXANDER and MARIA G. ALEXANDER, are the owners of that certain single-family residential lot commonly known as Lot No. 63, Zephyr Knolls #3 subdivision, described as Douglas County Assessor Parcel No. 5-132-33, and located in the unincoporated portion of Douglas County, State of Nevada. Plaintiffs RICHARD W. ALEXANDER and MARIA G. ALEXANDER are citizens of the State of Texas, and currently permanently reside at 351 Lakeside Lane #305, Houston, Texas, 77058. The Zephyr Knolls #3 subdivision, in which Plaintiff's Lot is located, is a previously legally-approved subdivision, approximately 50% built-out in the area neighboring Plaintiffs lot, currently served by paved roads, sewers, water, electricity, and other utilities. Plaintiffs' lot fronts on Lake View Drive, a paved County road within said subdivision.

2. Plaintiffs purchased said Lot in 1957, and since that date have timely paid all property taxes when due, and those public assessments for bonds used to fund and construct sewer and water facilities to serve said Lot, including but not limited to those constructed by the Round Hill General Improvement District, Tahoe Douglas Sewer District and the Douglas County Sanitation District. Comparable lots in the same neighborhood as Plaintiffs' lot have a fair market value of approximately $40,000.00 if they can be utilized as single-family homesites. Plaintiffs purchased their lot for the purpose of building their retirement home, and desire to be able to use said lot for that purpose at the earliest possible date

as they have intended to build a retirement home on their lot for 27 years.

3. The use of Plaintiffs' Lot as a single-family homesite is permitted under applicable zoning of the County of Douglas. Defendant TRPA's new Regional Plan has designated the Zephyr Knolls #3 subdivision as a residential area allowing for new single-family residential housing, and continuation of existing residential development. Because of its location in an existing residential subdivision, the applicable local zoning, and other restrictions contained in TRPA's Regional Plan, there are no other reasonable, practical, viable or feasible uses to which Plantiffs can put their property except the construction of a single-family home.

4. Plaintiffs' Lot is shown on the TRPA Regional Plan Maps (Map No. H-14 attached hereto), and/or in the computerized data base of the TRPA, as being at least 100% within a Class 2 area. Based upon said classification, and in view of the prohibitions and restrictions contained in TRPA's Regional Plan and TRPA's Ordinance 81-5, as more particularly set forth in this Complaint, Plaintiffs are prohibited and precluded from using their property to build a single-family home, or undertaking any other development or building on said real property, thereby depriving Plaintiffs of substantially all reasonable and practical use of their property, making said property virtually unmarketable, and denying and taking all of the special benefits paid for by Plaintiffs in connection with those special assessments levied against said property to pay for sewer and water improvements to serve said property.

Supreme Court, U.S.
FILED
FEB 28 1991
OFFICE OF THE CLERK

No. 90-1212

In The

Supreme Court of the United States

October Term, 1990

TAHOE-SIERRA PRESERVATION COUNCIL, INC., *et al.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, *et al.*,

Respondents.

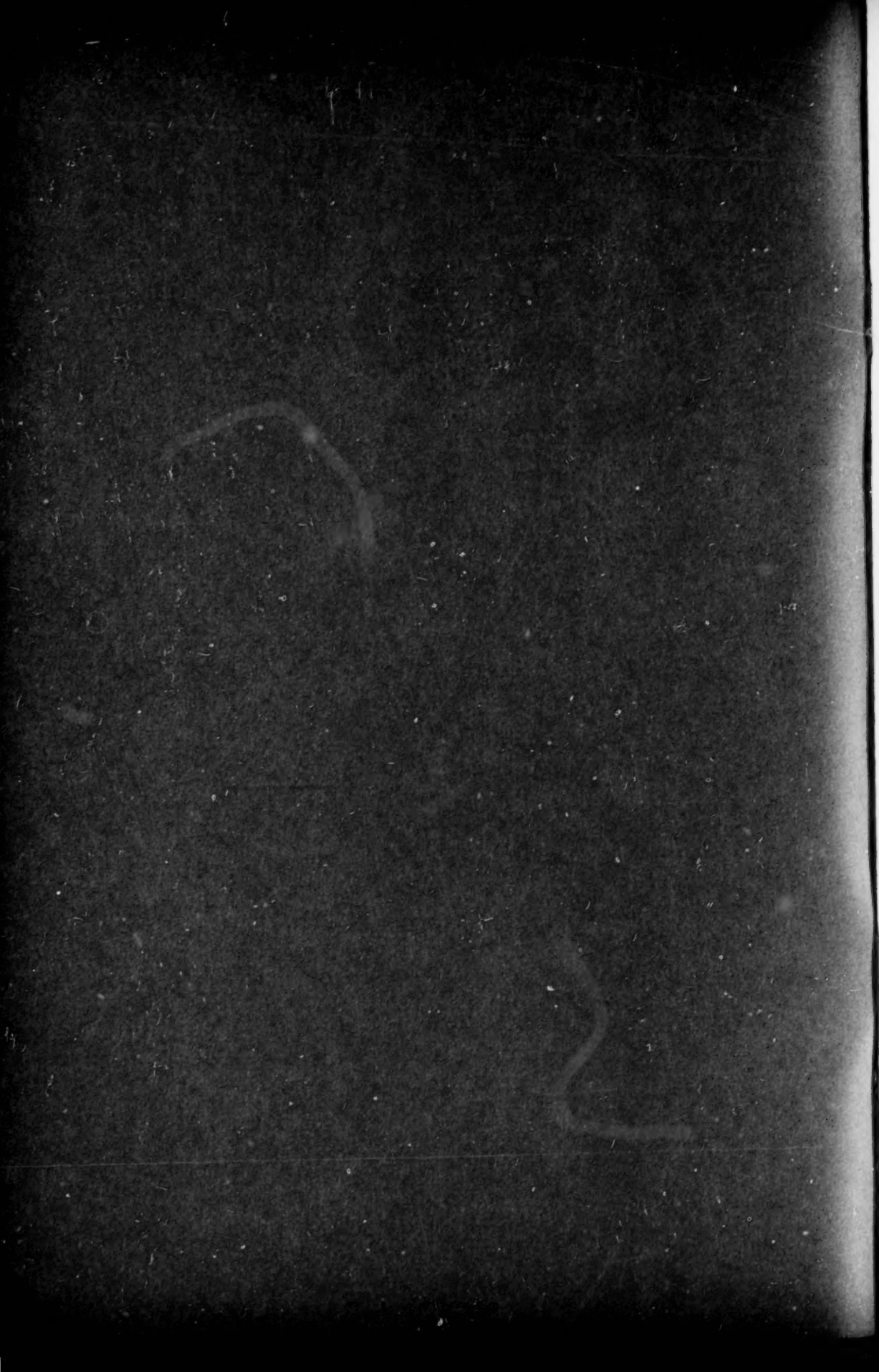
Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT TAHOE REGIONAL PLANNING AGENCY

GARY A. OWEN
CROWELL, SUSICH, OWEN & TACKES
510 West Fourth Street
P.O. Box 1000
Carson City, Nevada 89702
(702) 882-1311

Counsel of Record for Respondent Tahoe Regional Planning Agency

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831



QUESTIONS PRESENTED

1. Did the Court of Appeals properly require Petitioners Tahoe-Sierra Preservation Council, *et al.*, before filing a Fifth Amendment takings challenge against the regional plan of Respondent Tahoe Regional Planning Agency, to apply for an amendment of the plan as to their specific properties under the special procedure of Article V(a) of the Tahoe Regional Planning Compact, a procedure at the election of the property owner and under which TRPA is compelled to timely consider and act upon the application?

2. Should this Court grant certiorari to consider a takings-ripeness case emanating from regulations of the Tahoe Regional Planning Agency governing land use and environmental protection in the unique, complex ecosystem of the Lake Tahoe Basin when, because of the state of the record below, the questions posed by petitioners are ambiguous and possibly moot, and when granting certiorari may well encourage a spate of facial takings claims presenting no concrete controversies?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

TABLE OF ABBREVIATIONS vii

I. OPINIONS BELOW 2

II. STATUTORY PROVISION INVOLVED 2

III. STATEMENT OF THE CASE 3

A. NATURE OF THE CASE 3

B. PROCEEDINGS BELOW 4

C. THE LAKE TAHOE BASIN 4

D. THE UNPRECEDENTED APPROACH TO STEMMING THE DECLINE 8

1. The 1969 Compact 8

2. The 1980 Compact 9

3. Implementation of the 1980 Compact .. 10

4. The California Attorney General's Injunction 12

5. The 1987 Plan 13

IV. REASONS FOR DENYING THE PETITION ... 13

A. SUMMARY 13

B. THE ISSUES HERE – ASSUMING THEY CLEARLY EMERGE AT ALL – ARE NOT NATIONALLY IMPORTANT QUESTIONS OF FEDERAL LAW 14

TABLE OF CONTENTS – Continued

Page

C. THE COURT OF APPEALS' DECISION ACCORDS WITH PRECEDENTS OF THIS COURT 15

1. Lending Itself to Finality of Governmental Action, Article V(a)'s Special Procedure Must Be Pursued Before Launching A Federal Takings Claim.. 15

2. This Court Has Not Encouraged Facial Takings Claims 17

D. GRANTING CERTIORARI POSES LEGAL AND PRACTICAL PROBLEMS OF NATIONAL IMPORTANCE..... 20

V. CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES:

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 19

Buckley v. Valeo, 424 U.S. 1 (1976) 19

Hodel v. Virginia Surface Mining & Recl. Assn., 452 U.S. 264 (1981) 17, 18

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987) 17, 18, 19

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 17

New Orleans Pub. Serv. v. New Orleans, 491 U.S. 350 (1989) 16

Pacific Gas & Elec. v. Energy Resources Comm'n, 461 U.S. 190 (1983) 19

Pennell v. San Jose, 485 U.S. 1 (1988) 18, 19

People ex rel. Younger v. County of El Dorado, 5 Cal.3d 480, 96 Cal.Rptr. 553, 487 P.2d 1193 (1971) 8

People of California v. Tahoe Regional Plan Agency, 766 F.2d 1308 (9th Cir. 1985)..... 7, 9, 11, 12

People of California v. Tahoe Regional Planning Agency, No. CIVS-84-0561-EJG (E.D. Cal. 1984) 12

People of St. of Cal. ex rel. Younger v. Tahoe Reg. P. Ag., 516 F.2d 215 (9th Cir. 1975), *cert. denied*, 423 U.S. 868 (1975) 8

Prentis v. Atlantic Coast Line, 211 U.S. 210 (1908) 16

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 19

TABLE OF AUTHORITIES – Continued

Page

Tahoe-Sierra Preservation v. Tahoe Reg. Planning, 611 F.Supp. 110 (D. Nev. 1985) 2

Tahoe-Sierra Preservation v. Tahoe Regional Planning, 638 F.Supp. 126 (D. Nev. 1986) 2

Toilet Goods Assn. v. Gardner, 387 U.S. 158 (1967) 19

Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 16

FEDERAL STATUTES

Federal Clean Water Act (33 U.S.C. Section 1251, *et seq.*..... 10

INTERSTATE COMPACTS

Tahoe Regional Planning Compact, Pub. L. 91-148, 83 Stat. 360 (1969); Cal. Gov. Code Sections 66800 and 66801; N.R.S. 277.190 and 277.200

Article I(c) 8

Tahoe Regional Planning Compact, Pub. L. 96-551, 94 Stat. 3233 (1980); Cal. Gov. Code Sections 66800 and 66801; N.R.S. 277.190 and 277.200

Article I(a) 9

Article II(i) 9

Article V(A) ..... *passim*

Article VI(j)(4) 20

TABLE OF AUTHORITIES – Continued

Page

TREATISE

3 K. Manaster and D. Selmi, *California Environmental Law and Land Use Practice*, Section 64.04 (6) (1990) 9

TABLE OF ABBREVIATIONS

The following abbreviations are employed in this brief:

1.	"App."	– Appendix to Petition for Writ of Certiorari of Tahoe-Sierra Preservation Council, Inc., *et al.*
2.	"C.R."	– District Court Clerk's Record
3.	"Pet."	– Petition for Writ of Certiorari of Tahoe-Sierra Preservation Council, Inc., *et al.*
4.	"TRPA"	– Respondent Tahoe Regional Planning Agency
5.	"TSPC"	– Collectively Petitioners Tahoe-Sierra Preservation Council, Inc., *et al.*
6.	"1969 Compact"	– Tahoe Regional Planning Compact, Pub. L. 91-148, 83 Stat. 360 (1969); Cal. Gov. Code Sections 66800 and 66801; N.R.S. 277.190 and 277.200
7.	"1980 Compact"	– Tahoe Regional Planning Compact, as amended, Pub. L. 96-551, 94 Stat. 3233 (1980); Cal. Gov. Code Sections 66800 and 66801; N.R.S. 277.190 and 277.200
8.	"1984 Plan"	– The TRPA Regional Plan, adopted April 26, 1984

No. 90-1212

In The

Supreme Court of the United States

October Term, 1990

TAHOE-SIERRA PRESERVATION COUNCIL, INC., *et al.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT TAHOE REGIONAL PLANNING AGENCY

The Tahoe Regional Planning Agency, Respondent, respectfully submits this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, filed January 28, 1991, by Tahoe-Sierra Preservation Council, Inc., and named members thereof, Petitioners.

I

OPINIONS BELOW

TRPA[1] concurs in this portion of TSPC's petition, except that the decisions of the United States District Court, District of Nevada, were reported: *Tahoe-Sierra Preservation v. Tahoe Reg. Planning,* 611 F.Supp. 110 (D. Nev. 1985); *Tahoe-Sierra Preservation v. Tahoe Regional Planning,* 638 F.Supp. 126 (D. Nev. 1986).

II

STATUTORY PROVISION INVOLVED

The statutory provision involved in this case is Article V(a) of the 1980 Compact (Pub. L. No. 96-551, 94 Stat. 3233, 3239 [1980]; App. E, at 88a), which provides:

> If a request is made for the amendment of the regional plan by:
>
> * * *
>
> (2) the owner or lessee of real property which would be affected by such amendment,
>
> the governing body shall complete its action on such amendment within 180 days after such request is accepted as complete according to standards which must be prescribed by ordinance of the agency.

---

[1] Terms represented by abbreviations such as "TRPA", "TSPC" and others frequently used in this brief are referred to in the Table of Abbreviations set forth on the page immediately preceding the title page.

III

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case involves the sensitive environmental enclave in the Lake Tahoe Basin and the special approach there to land use and environmental planning. It focuses upon the failure of TSPC, a would-be Fifth Amendment takings plaintiff, to pursue a unique procedure in the interstate compact creating TRPA requiring the agency to timely consider a request by TSPC to amend the agency's regional plan with respect to the specific property owned by TSPC.[2] Eschewing this procedure, TSPC raises what it characterizes as an exclusively "facial" takings challenge to TRPA's 1984 Plan.[3]

---

[2] TSPC implies that its organization represents all property owners interested in TRPA's 1984 Plan. *See* Pet., at 3. That is not the case: property-owner petitioners here number 364, while TSPC's complaint alleges, as is the case, that there are literally thousands of vacant, single-family residential lots or parcels in the Lake Tahoe Basin. App. F, at 153a-154a.

[3] TSPC's complaint does not use the words "facial" or "on its face" when describing its challenge to TRPA's 1984 Plan. Moreover, the complaint incorporates voluminous, detailed appendices describing each of the individual plaintiffs' properties. Two examples are attached as an appendix to the petition. App. F, at 195a-199a. The "facial" gloss was first placed upon its complaint in TSPC's opposition to defendants' motions to dismiss the complaint upon ripeness and other grounds. C.R. 28, at 70-72. Confronted with the reasons for the appendices, TSPC maintained they were attached "only for the sake of orderliness and brevity". *Id.*, at 71. Subsequent briefing by the parties treated the complaint as though it presented a facial challenge, although, contrary to TSPC's representations

(Continued on following page)

B. PROCEEDINGS BELOW

TSPC states the defense based upon Article V(a) of the 1980 Compact was "just cursorily mentioned" in one of Respondents' briefs below and was "never seriously argued" to the District Court. Pet., at 25. That is not correct. While the trial court relied upon alternative grounds for holding TSPC's complaint premature (App. C, at 62a-63a), the Article V(a) ground was explicitly asserted in TRPA's brief in support of its motion to dismiss TSPC's complaint. C.R. 16, at 56. TSPC addressed it in its opposition to the motion (C.R. 28, at 70-72), and then TSPC *raised* the Article V(a) issue in its opening brief in the Ninth Circuit Court of Appeals. Opening Brief for Appellants, at 41-42. TRPA in turn defended the ground in its brief before the appellate court. Brief of Appellee, at 17, 22-23.

C. THE LAKE TAHOE BASIN[4]

The Lake Tahoe Basin rests over 6,000 feet above sea level in the Sierra Nevada and occupies 324 square miles

---

(Continued from previous page)

to this Court (Pet., at i, 11, & 12, n. 10), the Ninth Circuit Court of Appeals' decision did not hold or determine TSPC's "facial challenge" was not ripe for review. The Ninth Circuit never used the terms "facial", "on its face" or other words of similar purport. *See* App. A.

[4] Most of the following description is taken from the Environmental Impact Statement for the Establishment of Environmental Threshold Carrying Capacities, Tahoe Regional Planning Agency, May, 1982. The document was attached as

(Continued on following page)

astride the California-Nevada border. Lake Tahoe, the focal point of the basin, is surrounded by magnificent mountain peaks, some almost a mile higher than the surface of the lake. Descending abruptly from the peaks and ridges to the lake's edge, the lands within the basin are quite steep, with about three-quarters of the area comprising slopes in excess of 30%. C.R. 17, Ex. B, at 7.

Lake Tahoe is 12 miles wide and 22 miles long, with a surface area of 192 square miles. It is the tenth deepest lake in the world, having a maximum depth of 1,645 feet. *Id.*, at 8. Lake Tahoe is "ultraoligotrophic", characterizing a lake which is extremely clear with low concentrations of nutrients otherwise supporting the growth of algae. Until recently, the lake had a 10,000-year history of being at or near equilibrium in the gain and loss of nutrients. *Id.*, at 9.

Nutrients, such as nitrogen, are introduced to Lake Tahoe through surface and sub-surface flows from the lake's 63 watersheds. The amount of nitrogen and other nutrients carried to the lake depends upon the soils, vegetation and land use within each watershed. *Id.*, at 10.

Impervious cover and surface disturbance of soil in the Lake Tahoe Basin impede the soil's natural function as a medium for growth of vegetation and storage of

---

(Continued from previous page)

Exhibit B to C.R. 17, an affidavit submitted for purposes of judicial notice in support of TRPA's motion to dismiss TSPC's complaint. It will be cited in the text through the short-form designation, "C.R. 17, Ex. B". References in the text to other exhibits to C.R. 17 are to other documentary evidence attached to the affidavit.

nutrients. Vegetation is an important component of the ecosystem, responsible for removing nutrients, particularly nitrogen, from precipitation. Absent vegetation, erosion increases sediment loads to Lake Tahoe, in turn resulting in the storage of nutrients in the lake, rather than in the watershed where they belong. C.R. 17, Ex. D, at 30. Impervious cover on the other hand prevents infiltration of precipitation, resulting in heightened runoff. C.R. 17, Ex. B, at 17-18.

The recent annual suspended sediment load to Lake Tahoe from surface runoff is approximately 27,000 metric tons, about four times the natural load. Isolated examples of development have revealed suspended sediment concentrations 100 to 1,000 times the natural. These elevated loads of sediments, accompanied by nutrients, cause a decline in clarity and an increase in algal productivity in the lake. C.R. 17, Ex. D., at 31.

Lake Tahoe and its tributaries are experiencing a downward trend in water quality. Sediment-caused disturbance of the lake's natural nutrient-loading equilibrium has resulted in accelerated eutrophication of the waters: a decline in annual average depth of visibility from 31.2 meters in 1968 to 27.6 meters in 1981; a decline in winter clarity from an average of 33.6 meters' visibility in 1968 to 14.9 meters in 1981. There has been a corresponding increase in algae of 110% from 1959 to 1980, averaging 5.2% per year.[5] C.R. 17, Ex. B, at 12.

---

[5] These alarming trends prompted the framers of the 1980 Compact to declare in Article I(a)(1) that the waters of Lake

(Continued on following page)

The Lake Tahoe Basin contains thousands of *undeveloped*, single-family residential lots. C.R. 17, Ex. C, at 13. Even TSPC alleges that TRPA has documented approximately 19,300 vacant lots or parcels, of which 6,400 are wholly or partially located in Land Capability Districts 1, 2 or 3 and 4,900 similarly classified as Stream Environment Zone (SEZ).[6] App. F, at 153a. All of TSPC's lots fall within these most-sensitive categories. *Id.*, at 154a. And TSPC does not dispute the correctness of their classification. App. A, at 17a.

The basin's unparalleled natural features, coupled with close proximity to large population centers primarily in Northern California, have marked it the quintessential retreat. But in the prescient words of the California

---

(Continued from previous page)

Tahoe were "threatened with deterioration or degeneration, which endangers the natural beauty and economic productivity" of the area. App. E, at 73a. Moreover, what TSPC *now* describes as "perceived environmental abuses" (Pet., at 4 & 6) were never the subject of debate below. Indeed, TSPC has *never* disputed – or even questioned – the overwhelming evidence documented in the record below that Lake Tahoe is becoming increasingly polluted.

[6] TRPA employs a scientific system of "land capability" classification, which allocates maximum amounts of impervious surface depending upon, among other things, the erosion and runoff potential of soils and the slopes on which they are located. Capability classes or districts range from 1 to 7, with Classes 1 through 3, including Stream Environment Zones (Class 1 [b]), comprising the "high-hazard" or most-sensitive lands of the spectrum. Class 1 and 2 lands are allowed 1% coverage while lands in Class 3 are allowed 5%. *See* C.R. 17, Ex. B, at 19; *see generally People of California v. Tahoe Regional Plan Agency*, 766 F.2d 1308, 1315 (9th Cir. 1985). In its 1972 Plan adopted under the 1969 Compact (Pub. L. 91-148, 83 Stat. 360 [1969]) TRPA allowed numerous coverage "overrides" to the percentage limitations.

Supreme Court, "there is good reason to fear that the region's natural wealth contains the virus of its ultimate impoverishment." *People ex rel. Younger v. County of El Dorado*, 5 Cal.3d 480, 485, 96 Cal.Rptr. 553, 487 P.2d 1193 (1971). As things now stand, the region does not have a supply of resources and capacities adequate to meet pressing residential demands, not to mention those for commercial and recreational uses, and yet maintain the values the framers of the 1980 Compact found so important. *See* C.R. 17, Ex. C, at 13.

D. THE UNPRECEDENTED APPROACH TO STEMMING THE DECLINE

1. The 1969 Compact. As unmatched as the Lake Tahoe Basin itself is the effort to preserve it. Although it is a single air and water basin comprising portions of two states, six local governments and numerous special districts, along with substantial federal holdings, there has been a unified, if novel, endeavor to address the area's problems. The States of California and Nevada, with the approval of Congress, selected the interstate compact as the best means to treat its manifestly complex needs.

In 1969 they enacted the Tahoe Regional Planning Compact, Pub. L. 91-148, 83 Stat. 360 (1969). Establishing an agency described as the "*sui generis* [offspring] of a marriage between sovereign partners", *People of St. of Cal. ex rel. Younger v. Tahoe Reg. P. Ag.*, 516 F.2d 215, 218 (9th Cir. 1975), *cert. denied*, 423 U.S. 868 (1975), the 1969 Compact mandated TRPA's adoption of a regional plan of resource conservation and orderly development. 1969 Compact, Article I(c). Complying, the agency in 1972

adopted a regional plan and implementing ordinances. But because of a number of structural deficiencies in the Compact, they failed to cope with the persistent decline in the quality of the lake and its environs. *See generally* 3 K. Manaster and D. Selmi, *California Environmental Law and Land Use Practice*, Section 64.04 (6) (1990).

2. The 1980 Compact. Due to the failure of the 1969 Compact to cope with the degradation of the Lake Tahoe Basin, the states, with Congress' approval, extensively amended the document in December 1980. Pub. L. 96-551, 94 Stat. 3233 (1980).[7] In terms far more exigent than its predecessor, the 1980 Compact accentuated the mounting threats to the ecology of the region (Art. I[a], App. E, at 73a-75a) and declared the need to establish "environmental threshold carrying capacities"[8] and adopt a plan achieving them while providing orderly growth.

---

[7] The 1980 Compact is contained in Appendix E to TSPC's petition. The background of the 1980 amendments to the Compact and a description of the planning process they commenced are treated in *People of California v. Tahoe Regional Plan. Agency, supra*, 766 F.2d, at 1310-1312.

[8] "Environmental Threshold Carrying Capacity" is defined in Article II(i) (App. E, at 77a) of the 1980 Compact as "an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety within the region." Environmental thresholds are to include, but not be limited to, "standards for air quality, water quality, soil conservation, vegetation preservation and noise." *Id.*

3. Implementation of the 1980 Compact. The 1980 Compact triggered an unprecedented planning effort, not simply for a well-planned, pleasant community, but to rescue a world-class Alpine environment from the grips of imminent pollution. As a first step, TRPA on June 25, 1981, enacted Ordinance 81-5 (effective August 25, 1981), representing a coalescence of TRPA's responsibilities as an area-wide planning agency under Section 208 of the Federal Clean Water Act (33 U.S.C. Section 1251, *et seq.*) and to ensure the amended plan required by the 1980 Compact would not be outstripped by precipitate development of high-hazard lands.[9] Ordinance 81-5 was designed to give TRPA a measure of "breathing room" in its attempt to cope with the enormous dilemma of thousands of single-family lots located in sensitive lands.[10]

---

[9] Ordinance 81-5 appears in the record at C.R. 17, Ex. I. The focus of TSPC's petition is TRPA's 1984 Plan, *infra*, and TSPC disparages the plan as a continuation of a "similar predecessor 'interim moratorium' ", referring to Ordinance 81-5. Pet., at 4. Ordinance 81-5, however, contained a "case-by-case" system for approving construction of single-family homes on Land Capability Class 1, 2 and 3 lots (excluding SEZ's) in Nevada, a system for which TSPC clamored but, as the Court of Appeals correctly observed, of which it *failed* to take advantage. App. A, at 16a. TSPC thus incorrectly asserts that Ordinance 81-5 "effectively prohibited" building on TSPC's residential parcels. Pet., at 7.

[10] TRPA determined later that construction of a typical single-family residence on Class 1, 2 or 3 lands caused a significant adverse impact on water quality resulting from sediment-loading of approximately .44 metric tons per year for *each* such residence. C.R. 17, Ex. H, Section 1.28.

On August 26, 1982, TRPA adopted environmental threshold carrying capacities for the Lake Tahoe Basin. C.R. 17, Ex. A. The threshold, or standard, for impervious cover of soil was compliance with the percentage-coverage classifications of TRPA's land capability system. On April 26, 1984, TRPA adopted an amended regional plan, known as the "1984 Plan", representing the agency's first, albeit unsuccessful, attempt to comply with the mandates of the 1980 Compact. C.R. 17, Ex. F. Culminating an historic planning process of dimensions not even the framers of the 1980 Compact could have contemplated, *see People of California v. Tahoe Regional Plan Agency, supra,* 766 F.2d, at 1311-1312, the 1984 Plan attempted to balance acute pressures for use and development with consumption of the scant remaining resources of area. Regulating the amount, location and timing of development in conformance with the environmental thresholds, the plan prescribed a single-family residential evaluation system allowing 75 residences per year to be constructed during the first three years on Class 1, 2 and 3 lots, excluding SEZ's, in the Nevada portion of the basin. The plan contained an elaborate system of transfer of development rights, applicable to all high-hazard lands.[11]

---

[11] TSPC neglects the transfer program in its description of the "only" uses permissible in SEZ's. Pet., at 9, n. 7. Moreover, TSPC offers that the 75-residences-per-year provision for building on Class 1, 2 and 3 lots was but a "theoretical exception" that "to date" has never been implemented – as though it were a ruse. *Id.*, at 9, n. 8. To the contrary, the residential-evaluation system was *real* but, as indicated below, enjoined from implementation. That TSPC impugns it as merely "theoretical" and never taking effect, while opining a mere three footnotes earlier that the 1984 Regional Plan "remained in full force and effect" (*id.*, at 8, n. 5), is misleading.

It was TSPC's failure to file an application under Article V(a) of the 1980 Compact for mandatory consideration of an amendment to the 1984 Plan that in the judgment of the Court of Appeals rendered its takings challenge unripe. App. A, at 8a-16a.[12]

4. The California Attorney General's Injunction. On April 26, 1984, the very day TRPA adopted the 1984 Plan, the State of California sued TRPA for declaratory and injunctive relief, alleging the plan did not comply with the 1980 Compact. *People of California v. Tahoe Regional Planning Agency,* No. CIVS-84-0561-EJG (E.D. Cal. 1984). Following an immediate temporary restraining order, the District Court on August 9, 1984, preliminarily enjoined TRPA from approving any project within the basin, subject to certain limited exceptions not applicable here. *See* App. A, at 5a, n. 2. The District Court's order was affirmed on appeal. *People of California v. Tahoe Regional Plan Agency, supra,* 766 F.2d 1308.

---

[12] The Court of Appeals noted TRPA had urged TSPC's failure to pursue "*several* features of the 1984 Plan rendered its attack on the plan premature." *See* App. A, at 7a-8a (emphasis added). That is correct, for in addition to the unusual procedure of Article V(a), the 1984 Plan offered the following measures: the 75 annual permits for development of Class 1, 2 and 3 lands; a procedure to challenge the land capability classification of one's land; a system of transfer of development rights; and an opportunity to challenge the land capability classification of SEZ lands. *See* App. C, at 62a-63a. As the District Court observed, TSPC "admitted at oral argument that none of the options arguably open to land owner plaintiffs [sic] have been attempted." *Id.*, at 63a-64a.

5. The 1987 Plan. Following the 1984 Plan litigation, a process known as the "Consensus-Building Workshop" was initiated by TRPA to include the broadest possible range of private and governmental interests and viewpoints on the makeup of an amended plan. Lasting over two years, the discussions precipitated a plan adopted by the TRPA Governing Board on June 25, 1987. Approved in the settlement of the 1984 Plan litigation, the 1987 Plan is dramatically distinct from its predecessor and includes a scientifically-based individual parcel evaluation system for gradual development of unbuilt residential lots, excluding those located in streamzones. All lots in the basin, including SEZ lots, are entitled to transfer a number of different development rights under the plan.[13]

IV

REASONS FOR DENYING THE PETITION

A. SUMMARY

TSPC's petition should be denied for at least the following reasons: (1) the issues here – if they clearly emerge at all – do not present nationally important questions of federal law; (2) the Court of Appeals' decision accords with the precedents of this Court in its treatment

---

[13] Respondent State of California in its Brief in Opposition will argue that enactment of the 1987 Plan rendered takings claims with respect to the 1984 Plan moot. In addition, California will contend that, since the 1984 Plan never took effect, it could not have caused a taking of TSPC's properties.

of facial takings claims[14]; and (3) granting certiorari will only confuse, not clarify, issues surrounding facial takings and pose practical problems for federal courts handling takings cases.

B. THE ISSUES HERE – ASSUMING THEY CLEARLY EMERGE AT ALL – ARE NOT NATIONALLY IMPORTANT QUESTIONS OF FEDERAL LAW

Land use and environmental planning for the Lake Tahoe Basin does not lend itself to issues of national significance. The unique processes challenged by TSPC, to be sure, are driven by the equally exceptional qualities of the basin. Planning for Lake Tahoe's complex ecosystem and developmental patterns, quite simply, is like planning for no other place on earth.

Also extraordinary is the process of Article V(a) of the 1980 Compact (App. E, at 88a), which TSPC elected to forego. While TSPC casts the provision as similar to a California statutory deadline for action on land use permit applications (Pet., at 28, n. 19), the comparison misses the mark. A permit process, oftentimes ministerial in nature, assumes the existence of legislative infrastructure, such as a general plan, under which permits are issued. Far from compelling action upon a mere permit, Article V(a) allows the applicant, for its specific property, to target legislative considerations in establishing the infrastructure to begin with – in short to change the plan.

---

[14] Respondent State of California will address TSPC's contention that the decision of the Court of Appeals is at odds with recent decisions of other circuits. Pet., at 20-22.

Finally, what TSPC posits as a clear dichotomy in this case between facial and as-applied takings is not readily apparent from the record. Amid problems of pleading clarity, including highly specific complaint-appendices describing each plaintiff's property, alternative ripeness remedies eschewed by TSPC, and questions of causation and mootness, the would-be facial takings issue TSPC presents is at best muddled.

Accordingly, any decision on the issues here would be so steeped in novelty and confusion of the record that its precedential value would be quite limited.

C. THE COURT OF APPEALS' DECISION ACCORDS WITH PRECEDENTS OF THIS COURT

1. Lending Itself to Finality of Governmental Action, Article V(a)'s Special Procedure Must be Pursued Before Launching a Federal Takings Claim. TSPC maintains Part III. A. of the Ninth Circuit's decision (App. A, at 8a-16a) conflicts with or misapplies precedents of this Court. Pet., at 12-20. At the same time TSPC is unable to cite a single case addressing ripeness in the context of a procedure even remotely akin to Article V(a). *None* of TSPC's cases – nor any we have unearthed – holds or hints that a takings plaintiff may shun such a course and bolt immediately to a facial attack. For TSPC to maintain in essence that "no court has said you must first seek to amend the plan to ripen a claim against it" does not *raise* the question – it only shows the issue *never has* been raised.

Article V(a), geared to the specific property of the applicant, is a sensible measure to achieve the finality of governmental action emphasized by this Court as the kernel of a ripe takings claim. As much as the Court insisted the plaintiff in *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190-191 (1985), first apply for a variance to obtain a "final decision regarding how it will be allowed to develop its property", TSPC was properly held here to pursuit of a final decision under Article V(a). That course is necessitated by the takings ad hoc, factual inquiry into the economic impact of the challenged regulation and the extent to which it interferes with reasonable investment-backed expectations.[15] As this Court put it in a decision shortly after *Williamson*, there must be a "final and authoritative determination of the type and intensity of development legally permitted

---

[15] Requiring a final, definitive position under Article V(a) on how a prospective takings plaintiff may develop its property is analogous to this Court's historic insistence upon the finality of legislative action before it is challenged. *See, e.g., Prentis v. Atlantic Coast Line*, 211 U.S. 210, 228-230 (1908) (dismissed, as premature, takings challenge to order fixing rail-passenger rates because of plaintiff's failure first to pursue state constitutional right to appeal rates and obtain final decision fixing them). The reasoning of *Prentis* was recently reaffirmed, although held inapplicable, in *New Orleans Pub. Serv. v. New Orleans*, 491 U.S. 350, 105 L.Ed.2d 298, 319-320, 109 S.Ct. 2506, 2520 (1989). *New Orleans* intimated, however, that if there were an on-going legislative process, such as in *Prentis*, one could not assert even a *facial* challenge to an allegedly unconstitutional statute or zoning ordinance. *Id.*, 105 L.Ed.2d, at 320; 109 S.Ct., at 2520.

on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986).

2. This Court Has Not Encouraged Facial Takings Claims. Addressing a facial takings challenge to the Surface Mining Control and Reclamation Act of 1977, this Court in *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264 (1981), criticized the District Court for ignoring the Court's "oft-repeated admonition" that, particularly in cases alleging an unconstitutional taking of private property, the constitutionality of a statute should not be decided "except in an actual factual setting that makes such a decision necessary." *Id.*, at 294-295. The Court stressed, moreover: "Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land." *Id.*, at 295. The only issue before the Court, then, was whether the "mere enactment" of the surface mining statute constituted a taking. *Ibid.* Finding no taking, this Court held plaintiffs could not complain about the act because they had not availed themselves of administrative relief under it, relief possibly working a "mutually acceptable solution" and thus obviating the need to address constitutional questions. *Virginia Surface Mining*, 452 U.S., at 297.

In *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 490-495 (1987), a facial takings attack on a Pennsylvania law prohibiting mining-caused subsidence, this Court cited *Virginia Surface Mining*, 452 U.S. 264, and repeated the admonition that takings claims should be

presented in actual factual settings. 480 U.S., at 494. It cautioned plaintiffs of the difficulty in showing that the "mere enactment" of a regulation denied them economically viable use of their property, observing that they "face[d] an *uphill battle* in making a facial attack. . . . " *Id.*, at 495 (emphasis added).

The admonition of *Virginia Surface Mining* and the caution of *Keystone* reached their apex in *Pennell v. San Jose*, 485 U.S. 1 (1988), where an association of apartment-house owners challenged, as " '*facially* unconstitutional and therefore . . . illegal and void' ", a rent-control ordinance enacted by the City of San Jose. *Id.*, at 4 (emphasis added). The measure allowed a hearing officer to consider hardship to the tenant when determining whether to approve a rent increase proposed by a landlord. *Ibid.* This Court held it would be "premature" to consider the contention that reduction of rent on grounds of hardship accomplished an unconstitutional transfer of the landlord's property to individual tenants. *Pennell*, 485 U.S., at 9. It stressed not only that the tenant hardship clause had never been relied upon by a hearing officer to reduce rent, but that the officer was only given discretion, not compelled, to refuse rent increases on the basis of hardship. *Id.*, at 9-10.

Citing *Virginia Surface Mining*, 452 U.S. 264, the *Pennell* Court once again warned that takings cases should be resolved in actual factual settings making a decision necessary. *Pennell*, 485 U.S., at 10. It found that merely because a hearing officer was required to consider hardship to the tenant in fixing a landlord's rent, there was no sufficiently concrete factual setting absent a showing that in a particular case such an action had occurred. *Id.*

In *Pennell*, then, this Court clearly applied the doctrine of ripeness to a *facial* takings claim.[16] That, of course, is precisely what TSPC maintains this Court has never done.[17] *See* Pet., at 18-20.

In view of these cases, especially *Pennell*, it is highly suspect a takings plaintiff can so easily circumvent the ad

---

[16] In his dissent, Justice Scalia disagreed with the majority opinion's conclusion that the takings claim, as distinguished from other claims, was premature. *Pennell*, 485 U.S., at 15 (Scalia, J., dissenting). Justice Scalia remarked that, while *Keystone Bituminous Coal Assn.*, 480 U.S. 470, had declared a facial takings claim to be a battle that was "uphill", "we allowed it to be fought, and did not declare it 'premature'." 485 U.S., at 17. He observed that the majority in *Pennell* thus had rejected as unripe a challenge to the "mere enactment" of a statute. *Id.*, at 18. He implied, however, that a challenge to a regulation because it denied an owner economically viable use of his or her land properly may be held unripe in its facial form *"where the issue can be more forcefully presented in an 'as-applied' attack. . . . " Id.*, at 18-19 (emphasis added). He contrasted the facial takings claim in *Pennell*, however, stressing it asserted that the rent-control ordinance did not substantially advance legitimate state interests. *Ibid.* The substantiality prong of takings analysis is not involved in the case at bar – the economically viable use question *is*.

[17] Contrary to what TSPC suggests and aside from *Pennell v. San Jose*, 485 U.S. 1, this Court has never hesitated to apply ripeness principles to facial statutory and regulatory challenges. *See, e.g., Pacific Gas & Elec. v. Energy Resources Comm'n*, 461 U.S. 190, 200-203 (1983); *Buckley v. Valeo*, 424 U.S. 1, 113-118 (1976); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138-148 (1974); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967); *Toilet Goods Assn. v. Gardner*, 387 U.S. 158, 164-166 (1967).

hoc, factual inquiry by sidestepping a procedure such as Article V(a) of the 1980 Compact. That procedure, one over which *the property owner* has control to initiate and mandate a timely response, is an extraordinary means to bridge the gap between facial and as-applied claims.[18]

D. GRANTING CERTIORARI POSES LEGAL AND PRACTICAL PROBLEMS OF NATIONAL IMPORTANCE

If this Court grants TSPC's petition – not to mention reverses the Ninth Circuit's decision – it will send a confusing message. While the Court to date unmistakably has labored to discourage facial takings claims, in favor of ones presenting justiciable controversies, hearing this case undoubtedly will encourage prospective plaintiffs to file the facial variety, at the expense of developing key facts for the ad hoc, factual inquiry – and of possibly resolving the matter. Federal courts thus may face a

---

[18] TSPC would short-circuit resort to Article V(a) by asserting an attempt to amend the plan would be futile because the plan was adopted over TSPC's "vehement" opposition. Pet., at 7 & 15. The argument, however, obfuscates the important distinction between a global enactment, such as the regional plan, and consideration of its applicability to *specific property*, a process envisioned by Article V(a). TSPC's further complaint, that applying for relief under Article V(a) may well time-bar a challenge to the regional plan, is equally to no avail. Pet., at 25, n. 17. Indeed, under Article VI(j)(4) of the 1980 Compact (App. E, at 105a) a legal action challenging a plan of the agency "shall be commenced within 60 days after *final* action by the agency." (Emphasis added.) A takings claim, even to the mere enactment of the plan, obviously would not be final until relief had been sought and action taken under Article V(a).

superfluity of facial cases brought by litigants merely attempting to test the "takings waters", albeit in disregard of procedures such as Article V(a) of the 1980 Compact. And if their facial cases are unsuccessful, the plaintiffs simply may turn around and ripen as-applied challenges – and file additional suits.

Accordingly, we respectfully submit it appears of national importance to *reject* TSPC's petition.

V

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Dated February 27, 1991.

Respectfully submitted,

GARY A. OWEN
CROWELL, SUSICH, OWEN & TACKES
510 West Fourth Street
P.O. Box 1000
Carson City, Nevada 89702

Counsel of Record for
Respondent Tahoe Regional
Planning Agency

Supreme Court, U.S.
FILED
FEB 28 1991
OFFICE OF THE CLERK

No. 90-1212

In The

Supreme Court of the United States

October Term, 1990

TAHOE-SIERRA PRESERVATION COUNCIL, INC., ET AL.,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT STATE OF CALIFORNIA IN OPPOSITION

DANIEL E. LUNGREN
Attorney General of the
State of California

RICHARD M. FRANK*
Acting Assistant Attorney General

CARLA J. CARUSO
Deputy Attorney General

Office of the Attorney General
1515 K Street, Suite 511
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone (916) 445-8178

Counsel for Respondent
State of California
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether petitioners' constitutional challenge to the 1984 Tahoe Regional Plan has been rendered moot because: a) a federal court, immediately following that Plan's enactment, enjoined it from ever taking effect; and b) respondent Tahoe Regional Planning Agency subsequently replaced the 1984 Plan with a new Regional Plan which differs materially from the 1984 Plan and has not been challenged in this litigation.

2. Whether the Court of Appeals properly applied the ripeness standards developed by this Court in several recent decisions to bar petitioners' facial takings challenge to the 1984 Tahoe Regional Plan, where petitioners by their own admission had failed to seek an amendment to that Plan as specifically authorized in the bistate Tahoe Regional Planning Compact.

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT 5

A. Petitioners' Constitutional Claims are Moot Because the 1984 Regional Plan Was Enjoined by Federal Court Order from Taking Effect, and Because it Has Been Wholly Superseded by a Materially Different 1987 Regional Plan 5

B. The Court of Appeals Properly Applied the Ripeness Standards Developed by This Court in Recent Decisions to Bar Petitioners' Facial Takings Challenge to the 1984 Regional Plan, Where Petitioners Had Failed to Seek an Amendment to That Plan as Specifically Authorized in the Tahoe Regional Planning Compact 7

1. The Unique Provision of the Tahoe Regional Planning Compact Applicable to This Proceeding Cannot Reasonably Be Ignored by Petitioners 7

2. The Ninth Circuit's Decision in Rejecting Petitioners' Facial Takings Challenge to the 1984 Regional Plan Is Fully Consonant with This Court's Previously-Articulated Ripeness Standards 8

3. The Decision Below Articulates a Ripeness Standard Fully Consistent with Those of Other Circuits 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES:

Agins v. Tiburon, 447 U.S. 255 (1980) 11

Beacon Hill Farm Associates v. Loudon County Board of Supervisors, 875 F.2d 1081 (4th Cir. 1989) 15

Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990), cert. denied, 59 U.S.L.W. 3441 (1991) 11, 15

Euclid v. Ambler, 272 U.S. 365 (1926) 11, 12

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1986) 12, 13

Fry v. City of Hayward, 701 F.Supp. 179 (N.D. Cal. 1988) 15

Goldblatt v. Hempstead, 369 U.S. 590 (1961) 13

Hodel v. Irving, 481 U.S. 704 (1987) 12

Keystone Bituminous Coal v. DeBenedictis, 480 U.S. 470 (1987) 12

Kinzli v. City of Santa Cruz, 818 F.2d 1449 (9th Cir. 1987), modified at 830 F.2d 968 (1987), cert. denied, 484 U.S. 1043 (1988) 8

Lewis v. Continental Bank Corp., 494 U.S. ___, 110 S.Ct. 1249 (1990) 6

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 13

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 10, 13, 16

TABLE OF AUTHORITIES – Continued

Page

Pennell v. City of San Jose, 485 U.S. 1 (1988)..... 10

People ex rel. Van de Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1308 (9th Cir. 1985) ...4, 5

Smithfield Concerned Citizens v. Town of Smithfield, 907 F.2d 239 (1st Cir. 1990).....11, 15

Southern Pacific Transportation Co. v. City of Los Angeles, 922 F.2d 498 (9th Cir. 1990)..... 14

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, CA No. 87-2096 3

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 611 F.Supp. 110 (D.Nev. 1985)..... 2

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 638 F.Supp. 126 (D.Nev. 1986)..... 2

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 911 F.2d 1331 (9th Cir. 1990) 3, 6

Webster v. Fall, 266 U.S. 507 (1925) 13

Williamson County v. Hamilton Bank, 473 U.S. 172 (1985) ..... *passim*

STATUTES

Indian Land Consolidation Act of 1983, Pub.L. 97-457, Tit. II, 96 Stat. 2519, § 207 12

TABLE OF AUTHORITIES – Continued

Page

INTERSTATE COMPACTS

Tahoe Regional Planning Compact, Pub.L. 96-551, 94 Stat. 3233 (1980); Cal. Gov. Code §§ 66800-66801; N.R.S. §§ 277.190-277.200 4

Art. V(a)(2) 5, 7, 8

OTHER AUTHORITIES

1B Moore's Federal Practice ¶ 0.402[2] 37 and n. 34 (2d ed. 1988) 13

Supreme Court Rules

Rule 10.1 14

Rule 10.1(a) 16

Rule 10.1(c) 14

No. 90-1212

In The

Supreme Court of the United States

October Term, 1990

TAHOE-SIERRA PRESERVATION COUNCIL, INC., ET AL.,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT STATE OF CALIFORNIA IN OPPOSITION

The State of California, Respondent, respectfully submits this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, filed January 28, 1991, by Tahoe-Sierra Preservation Council, Inc., and named members thereof, Petitioners.

OPINIONS BELOW

The opinion of the Court of Appeals (Petition Appendix at 1a-35a) is reported at 911 F.2d 1331. The opinions of the district court (Petition Appendix at 36a-52a and 53a-72a), contrary to petitioners' representations (Petition at 1-2), are reported at *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 611 F.Supp. 110 (D.Nev. 1985) and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 638 F.Supp. 126 (D.Nev. 1986), respectively.

JURISDICTION

Respondent State of California (hereinafter "California") concurs in petitioners' jurisdictional statement, with the caveat that petitioners' constitutional claims are moot for the reasons set forth herein.

STATUTORY PROVISION INVOLVED

California adopts petitioners' citation of statutory provisions raised by this petition, as supplemented by that of co-respondent Tahoe Regional Planning Agency (hereinafter "TRPA".)

STATEMENT OF THE CASE

California adopts the statement of the case contained in co-respondent TRPA's Brief in Opposition. However, California offers the following supplemental observations:

First, a parallel action brought by petitioner Tahoe-Sierra Preservation Council and individual property owners is currently pending in the Ninth Circuit Court of Appeals. (*Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, CA No. 87-2096.) While the complaint in that litigation raises the same substantive claims addressed in the present action, the district court in the case now before the Ninth Circuit analyzed and resolved those claims in a significantly different manner. Moreover, the Court of Appeals in the parallel appeal is considering several of the same issues (*e.g.*, mootness) presented by the instant petition.

Second, this case does not reach this Court with the constitutional issues raised by petitioners and addressed by the Court of Appeals fully resolved. Substantial portions of the case have been remanded to the district court for further proceedings. (*Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1342-1343 (9th Cir. 1990).) Indeed, the only aspect of the Court of Appeals' decision presently before the Court is the narrow holding that one of the petitioners' constitutional challenges to the 1984 Regional Plan is not ripe for review.

Finally and most importantly, the 1984 Tahoe Regional Plan (enacted by the Tahoe Regional Planning Agency on April 26, 1984, and hereinafter "1984 Regional Plan") which forms the basis of petitioners' challenge has never had any actual effect on petitioners' property, is no longer in effect, and never will be. This is due to two interrelated developments. Immediately upon TRPA's adoption of the 1984 Regional Plan, the People of the

State of California sued to enjoin the implementation of that Plan, on the ground that it failed to satisfy the stringent requirements of the bistate Tahoe Regional Planning Compact. (Pub.L. 96-551, 94 Stat. 3233 (1980); Cal. Gov. Code §§ 66800-66801; *N.R.S.* §§ 277.190-277.200; hereinafter "bistate Compact.")[1] The district court agreed, issuing the injunction sought by California, and the Court of Appeals affirmed. (*People ex rel. Van de Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1308 (9th Cir. 1985).) The 1984 Regional Plan consequently never took effect.

While that litigation was pending, TRPA, California, petitioner Tahoe-Sierra Preservation Council and numerous other interested parties undertook painstaking negotiations and mediation efforts designed to create a new Regional Plan which could satisfy both the legal requirements of the bistate Compact and the disparate interests of the parties involved. Those efforts, which consumed three years, ultimately bore fruit: in July 1987, TRPA adopted a new Regional Plan which expressly supersedes the 1984 Plan at issue here. The pending litigation was then settled and the injunction against the now-superseded 1984 Regional Plan was dissolved. As TRPA notes in its Brief in Opposition (at 13), the 1987 Plan is markedly different from that challenged in the present lawsuit. Petitioners, moreover, concede (Petition

---

[1] This stands in stark contrast to petitioner Tahoe-Sierra Preservation Council's opposite contention – advanced here and in related litigation – that the 1984 Regional Plan constituted an excessive and unconstitutional "overregulation" of private property.

at 8, n.5), that the 1987 Regional Plan is not at issue here.

ARGUMENT

Petitioners' challenge to TRPA's 1984 Regional Plan has been rendered moot as a result of that Plan's being enjoined by the district court and subsequently superseded by the 1987 Regional Plan. Moreover, the Court of Appeals properly followed applicable precedents in holding that petitioners' facial takings challenge to the 1984 Regional Plan was not ripe for judicial determination, due to petitioners' failure to seek an amendment to that Plan as specifically authorized under Article V(a)(2) of the bistate Compact. Accordingly, this case does not warrant review.

A. Petitioners' Constitutional Claims are Moot Because the 1984 Regional Plan Was Enjoined by Federal Court Order from Taking Effect, and Because it Has Been Wholly Superseded by a Materially Different 1987 Regional Plan.

Petitioners seek certiorari to review the ripeness standard applied by the Ninth Circuit to takings claims arising from the 1984 Regional Plan. However, petitioners' constitutional claims are moot because an injunction – issued by the district court and sustained on appeal by the Ninth Circuit – prevented that Plan from ever being implemented. (*See People ex rel. Van de Kamp v. Tahoe Regional Planning Agency, supra*, 911 F.2d 1331.)[2]

---

[2] In her concurring opinion below, Judge Fletcher reasoned that because the 1984 Regional Plan had never taken

(Continued on following page)

Moreover, the 1984 Regional Plan was explicitly superseded by TRPA's July 1987 adoption of a new Regional Plan that currently governs planning and development activities within the Tahoe Basin. The 1987 Regional Plan was the product of lengthy negotiations that included petitioner Tahoe-Sierra Preservation Council, dramatically differs from the terms of the superseded 1984 Regional Plan, and is not at issue in this litigation.

Federal courts may only adjudicate actual, ongoing cases or controversies. This requirement subsists through all stages of federal judicial proceedings, trial and appellate. (*Lewis v. Continental Bank Corp.*, 494 U.S. ___, 110 S.Ct. 1249, 1253-1254 (1990).) As noted, petitioners never were affected by the 1984 Regional Plan because a federal court enjoined that Plan before it was ever implemented. And, since the 1984 Regional Plan has now been superseded by the enactment of the 1987 Regional Plan, petitioners' lawsuit is devoid of any present, live controversy. A petition for certiorari ought not be granted to review a moot claim. (*See id.*)

(Continued from previous page)

effect, petitioners had failed to establish the key element of causation of their takings claims. (*Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, supra*, 911 F.2d at 1343-1344 (Fletcher, J., concurring).) California commends this analysis to the Court's attention, and believes it provides a fully adequate and independent basis upon which to deny the petition for writ of certiorari.

B. The Court of Appeals Properly Applied the Ripeness Standards Developed by This Court in Recent Decisions to Bar Petitioners' Facial Takings Challenge to the 1984 Regional Plan, Where Petitioners Had Failed to Seek an Amendment to That Plan as Specifically Authorized in the Tahoe Regional Planning Compact.

1. The Unique Provision of the Tahoe Regional Planning Compact Applicable to This Proceeding Cannot Reasonably Be Ignored by Petitioners.

This case involves interpretation of the Tahoe Regional Planning Compact, a uniquely-crafted document designed by California, Nevada and the United States Congress. That Compact deals both with the unique environmental features of Lake Tahoe, and the complex governmental relationships inherent to the region. (*See* co-respondent TRPA's Brief in Opposition at 8-11.)

The unique bistate Compact provides those affected by a Regional Plan a focused opportunity to seek relief from provisions of that Plan. Compact Article V(a)(2) specifically requires TRPA to act within 180 days upon a property owner's request for an amendment to TRPA's Regional Plan.[3] Petitioners failed to avail themselves of that procedural opportunity prior to commencing this litigation.

---

[3] Co-respondent TRPA has effectively rebutted petitioners' meritless contentions that recourse to the administrative remedy afforded by Article V(a)(2) would be futile or barred by the statute of limitations. (*See* TRPA Brief in Opposition at 20, n.16.)

Article V(a)(2) establishes a unique and specific procedure for seeking relief from otherwise-applicable Plan provisions. Accordingly, this Court's ripeness principles – requiring a final decision before a takings claim may be addressed on the merits – was appropriately applied by the court below to bar petitioners' takings claims. (*See Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir. 1987), modified at 830 F.2d 968 (1987), cert. denied, 484 U.S. 1043 (1988).)

2. The Ninth Circuit's Decision in Rejecting Petitioners' Facial Takings Challenge to the 1984 Regional Plan Is Fully Consonant with This Court's Previously Articulated Ripeness Standards.

Petitioners assertedly mount a "facial" challenge to the 1984 Regional Plan,[4] claiming a taking without just compensation because various aspects of the Plan allegedly limit their ability to develop their properties. They argue that their facial challenge should be exempted from the constitutional requirement that landowners seek a final decision as to the uses available for their property. Petitioners' arguments, however, ignore the ineluctable

---

[4] Petitioners, in their opposition to defendants' motions to dismiss the complaint on ripeness and other grounds, expressly sought to limit their challenge to the 1984 Regional Plan to a facial attack (District Court Clerk's Record 28 at 70-72), despite the specific aspects of the complaint which suggest an as-applied challenge (*e.g.*, the particularized information in the appendices to complaint containing information as to the land use capability of each parcel at issue in the lawsuit (Petition Appendix at 195a-199a)). Defendants below framed their responses consistent with petitioners' characterization of their claims as facial.

fact that a constitutional takings claim cannot be analyzed before a final decision as to the allowable uses of the subject property has been reached.[5]

In *Williamson County v. Hamilton Bank*, 473 U.S. 172 (1985), this Court specifically identified the ripeness requirements for takings claims raised under the Just Compensation Clause of the Fifth and Fourteenth Amendments. To pursue a takings claim, a landowner must obtain a final decision from local regulatory authorities regarding the uses to which the property in question can be put. (*Id.* at 186, 199-200.)[6] The "final decision" standard includes a requirement that the property owner seek variances from the applicable regulations. (*Id.* at 191.)

The reasons for the final decision requirement go to the nature of the constitutional claims themselves. (*Id.* at 190-191, 199-200.) As to constitutional takings claims, this Court reasoned that a final decision is necessary in order to analyze factors of particular significance: the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. (*Id.* at 190-191.) These criteria cannot be determined until a final decision has been made by the regulating

---

[5] In fact, petitioners' real disagreement appears to be with the ripeness standards identified in this Court's recent takings decisions, rather than the Court of Appeals' application of those standards. (*See, e.g.*, Petition at 4-6.)

[6] A second ripeness requirement articulated in *Williamson* – that a landowner must utilize state procedures which provide for obtaining just compensation (*Id.* at 194) – is not at issue here.

body as to the nature and extent of the development that will be permitted. (*See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348-349 (1986); *Williamson County v. Hamilton Bank, supra*, 473 U.S. at 199-200.)

The Court stated this principle forcefully in *MacDonald, Sommer & Frates v. Yolo County, supra*, 477 U.S. at 348:

> "It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."

Significantly, petitioners' assertion that a facial takings claim is somehow exempt from the final decision ripeness requirement does not address the foregoing constitutional analysis developed by this Court in *Williamson* and *MacDonald*. Moreover, petitioners' curious theory is effectively rebutted by the Court's recent decision in *Pennell v. City of San Jose*, 485 U.S. 1 (1988). *Pennell* rejected as premature a landowner's facial takings challenge to a municipal rent control ordinance.[7] Citing an administrative relief procedure contained in the ordinance, the Court held that it would be premature to consider the takings claim where the plaintiff had not first availed

---

[7] While there is some ambiguity as to the characterization of the claims raised in *Pennell*, this Court's analysis of the takings claims was a facial analysis of an ordinance as yet unapplied to a specific set of facts. The ordinance at issue in *Pennell* was attacked as "facially unconstitutional." (*Id.* at 4.)

himself of that administrative remedy. (*Id.* at 8-10.) Citing its earlier takings decisions, the Court admonished – again – that such claims must necessarily be resolved in the context of a concrete factual setting. (*See also Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980), in which the Court rejected the landowners' facial takings claim because they were "free to pursue their reasonable investment expectations by submitting a development plan to local officials.")

This reasoning has been embraced by the lower courts as well. As the First Circuit recently observed in *Smithfield Concerned Citizens v. Town of Smithfield*, 907 F.2d 239, 242 (1st Cir. 1990):

> "Under this particular [takings theory], the step of applying for variances must of necessity become a prerequisite to bringing a due process challenge – *whether facial or as applied* – because only by applying for variances would it become possible to learn whether or not the zoning ordinance had the same effect as a taking by eminent domain. *If a variance were granted, any taking claim would disappear.*" (Emphasis added.)

Petitioners' efforts to abrogate these established ripeness criteria regarding facial claims are unsupported by the authorities they cite. *Euclid v. Ambler*, 272 U.S. 365, 384 (1926), for example, considered a *due process and equal protection* challenge to a land use ordinance. These are, of course, different constitutional challenges than the takings claim raised here. (*See Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990), cert. denied, 59 U.S.L.W. 3441 (1991), for a discussion of different ripeness tests for various constitutional claims.) Moreover – and this flaw undermines petitioners' reliance on all Supreme Court

cases they cite – *Euclid* failed to identify or discuss the ripeness criteria applicable to current takings challenges. In short, the circumstances which led this Court to consider claims in *Euclid* without requiring that a variance be applied for do not exist in this case.

Other Supreme Court precedents relied upon by petitioner to support the notion that facial challenges are not subject to the final decision ripeness requirements similarly fail to address the ripeness requirement. (*See, e.g., Keystone Bituminous Coal v. DeBenedictis*, 480 U.S. 470 (1987) (the procedural posture of *Keystone* bears note: the parties filed a joint motion asking the lower court to certify the facial challenge for appeal) (*Id.* at 493-494).) In *Hodel v. Irving*, 481 U.S. 704 (1987) – another case cited by petitioners – this Court considered a variety of preliminary issues, including standing, but did not address the question of ripeness.[8]

Nor does *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1986), support petitioners' position. That case came to the Court in a procedural posture entirely different from the present litigation. In *First English*, the Court was asked to *assume* that an unconstitutional taking had occurred; the sole

---

[8] In any event, petitioners' characterization of this case as a facial challenge is surprising in that the plaintiffs in *Hodel* were heirs or representatives who had not received otherwise-inheritable interests in property, due to the operation of section 207 of the Indian Land Consolidation Act of 1983 (Pub.L. 97-459, Tit. II, 96 Stat. 2519.) (*Id.* at 709-710).

issue was the appropriate *remedy* for such an uncompensated taking. (*Id.* at 311.) Accordingly, the ripeness issue was neither raised nor discussed. However, the Court there took pains to distinguish cases such as *Williamson County v. Hamilton Bank, supra,* 473 U.S. 172, and *MacDonald, Sommer & Frates v. Yolo County, supra,* 477 U.S. 340, where "factual disputes yet to be resolved by state authorities might still lead to the conclusion that no taking occurred." (*Id.*) *First English* thus provides utterly no support for petitioners' claim.

It is axiomatic that decisions which fail to address or resolve a particular issue cannot serve as binding precedent for subsequent cases that raise the question. (*Webster v. Fall,* 266 U.S. 507, 511 (1925); 1B Moore's Federal Practice, ¶ 0.402[2] 37 and n.34 (2d. ed. 1988).) Because the Supreme Court cases embraced by petitioners simply do not address the ripeness issue, they are of no precedential value on this point.[9]

Petitioners have failed to establish that the decision below conflicts with applicable decisions of this Court.[10]

---

[9] Other cases cited by petitioners similarly lack discussion of ripeness issues: *Goldblatt v. Hempstead,* 369 U.S. 590 (1961), an action to enjoin further mining for failure to comply with local ordinances, contains no discussion of ripeness requirements. Also, *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), which involved a physical taking, fails to address ripeness principles.

[10] Petitioners' further argument that the decision below conflicts with prior Ninth Circuit precedent fails for three

(Continued on following page)

They have therefore failed to present a proper basis for granting the petition for certiorari. (Supreme Court Rules, Rule 10.1(c).)

3. The Decision Below Articulates a Ripeness Standard Fully Consistent with Those of Other Circuits.

Petitioners mistakenly assert that the decision below articulates a ripeness standard in conflict with recent opinions from the First, Fourth, and Eleventh Circuits. (Petition at 20-22, citing *Smithfield Concerned Citizens v. Town of Smithfield, supra,* 907 F.2d 239 (1st Cir.); *Beacon Hill Farm Associates v. Loudon County Board of Supervisors,* 875 F.2d 1081 (4th Cir. 1989); and *Eide v. Sarasota County, supra,* 908 F.2d 716 (11th Cir.).)

However, none of those cases involved the type of regulatory takings claims asserted by petitioners. Therefore, the ripeness standards applied to these distinct claims are inapposite.

(Continued from previous page)

distinct reasons. First, intra-circuit conflict does not constitute a stated ground for Supreme Court review. (*See* Supreme Court Rules, Rule 10.1.) Second, petitioners' reliance on the Ninth Circuit cases cited in the petition is flawed because the facts of those decisions make them inapposite to the present case. Finally, as petitioners themselves are ultimately forced to concede (*See* Petition at 24, n.16), the decision below is consistent rather than at variance with other Ninth Circuit precedents. (*See, e.g., Southern Pacific Transportation Co. v. City of Los Angeles,* 922 F.2d 498 (9th Cir. 1990).)

In *Beacon Hill Farm Associates v. Loudon County Board of Supervisors, supra,* 875 F.2d at 1084-5, the court considered a facial challenge to a land use regulation on *due process and equal protection* grounds. In *Smithfield Concerned Citizens v. Town of Smithfield, supra,* 907 F.2d at 242, analyzed above, the court considered a facial substantive due process claim to a land use regulation, which it found distinct from a due process takings claim. Neither of these cases involved a claim, as made by petitioners, of an unconstitutional taking of property. (*Smithfield, supra,* 907 F.2d at 241; *Beacon Hill, supra,* 875 F.2d at 1084.) That these cases each found the constitutional claims raised to be ripe without requiring that a variance be applied for (*Smithfield, supra,* 907 F.2d at 242; *Beacon Hill, supra,* 875 F. 2d at 1085) does not establish a conflict with the Ninth Circuit's ripeness requirements for a different constitutional claim.[11]

Similarly, *Eide v. Sarasota County, supra,* 908 F.2d 716, does not present a conflict with the Ninth Circuit's opinion below. In *Eide,* the court considered an as-applied "arbitrary and capricious due process claim" and an equal protection claim, and found these claims unripe because a final decision as to the uses permitted upon the property in question had not been obtained. (*Id.* at 723-725.) It is significant that the *Eide* court, in determining the ripeness standards applicable to the claims it faced, identified the ripeness standards for Fifth and

---

[11] Another factually inapposite case relied upon by petitioners is *Fry v. City of Hayward,* 701 F.Supp. 179 (N.D. Cal. 1988) which raises a facial equal protection claim.

Fourteenth Amendment takings claims as those articulated in *Williamson County, supra,* and *MacDonald, Sommer, & Frates, supra.* (*Id.* at 720-721.) As California identified *supra,* it is precisely these standards which were applied to petitioners' takings claims by the Ninth Circuit below.

Petitioners' claim that the decision below conflicts with those of other circuit courts of appeal is, therefore, without merit. Petitioners have failed to demonstrate any principled basis on which this case warrants Supreme Court review. (*Cf.* Supreme Court Rules, Rule 10.1 (a).)

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: February 28, 1991

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General

RICHARD M. FRANK, Acting
Assistant Attorney General*

CARLA J. CARUSO
Deputy Attorney General

Counsel for Respondent
State of California

*Counsel of Record

MOTION FILED
FEB 26 1991

No. 90-1212

In The

Supreme Court of the United States

October Term, 1990

TAHOE-SIERRA PRESERVATION COUNCIL, INC., et al.,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS TAHOE-SIERRA PRESERVATION COUNCIL, INC., ET AL.

RONALD A. ZUMBRUN
*EDWARD J. CONNOR, JR.
TIMOTHY V. KASSOUNI
*Counsel Of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amicus Curiae, Pacific Legal Foundation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS TAHOE-SIERRA PRESERVATION COUNCIL, INC., ET AL. 1

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS TAHOE-SIERRA PRESERVATION COUNCIL, INC., ET AL. 5

INTEREST OF AMICUS CURIAE 5

STATEMENT OF THE CASE 6

SUMMARY OF THE ARGUMENT 7

ARGUMENT 8

I. AS A MATTER OF PUBLIC POLICY, PRIVATE PROPERTY OWNERS SHOULD NOT BE REQUIRED TO APPLY FOR AN AMENDMENT TO THE LAND USE LAW ITSELF BEFORE SEEKING JUDICIAL RELIEF 8

II. THE NINTH CIRCUIT'S NEW "RIPENESS" RULE CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS 12

CONCLUSION 14

TABLE OF AUTHORITIES CITED

Page

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 11

Agins v. Tiburon, 447 U.S. 255 (1980) 12

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 2, 13, 14

Hodel v. Irving, 481 U.S. 704 (1987) 2

Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264 (1981) 12

Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) 2, 12, 13

Lynch v. Household Finance Corporation, 405 U.S. 538 (1972) 15

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 2

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 12

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) ... 7, 8, 13

STATUTES

Cal. Gov't Code § 65302 10

§ 66801 6

Nev. Rev. Stat. § 277.200 6

Pub. L. No. 96-551, 94 Stat. 3233 (1980) 6

RULES

Supreme Court Rule 37 1

No. 90-1212

In The

Supreme Court of the United States

October Term, 1990

TAHOE-SIERRA PRESERVATION COUNCIL, INC., et al.,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS TAHOE-SIERRA PRESERVATION COUNCIL, INC., ET AL.

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits the annexed brief amicus curiae in support of petitioners, Tahoe-Sierra Preservation Council, *et al.* Written consent to the filing of this brief has been granted by counsel for petitioners. This consent has been lodged with the clerk of this Court.

Consent has been withheld by counsel for respondent, Tahoe Regional Planning Agency.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Just Compensation and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

The per curiam opinion below adds yet another "ripeness" hurdle for property owners seeking redress under the Fifth Amendment's Just Compensation Clause. In holding that a property owner must first seek an amendment to the land use law itself, even in a *facial* challenge, the opinion flouts the precedents of this Court and has created an unequivocal conflict with the decisions of other Circuit Courts.

The opinion also fails to acknowledge the practical effect of its holding. Requesting a government agency to amend a land use ordinance or statute can be enormously expensive, time-consuming, and utterly futile. Under the Ninth Circuit's per curiam opinion, property owners may have the "technical" right to seek just compensation under the Fifth Amendment for overburdensome governmental regulations, but few will have the economic resources and psychological tenacity needed to comply with this new and novel "ripeness" requirement. The public interest supports practical, commonsense limitations on expansions to the increasingly dilatory "ripeness" doctrine.

It is respectfully requested that this motion for leave to file the annexed brief amicus curiae be granted.

DATED: February 26, 1991.

Respectfully submitted,

RONALD A. ZUMBRUN
*EDWARD J. CONNOR, JR
TIMOTHY V. KASSOUNI
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

By _____
EDWARD J. CONNOR, JR.

Attorneys for Amicus Curiae,
Pacific Legal Foundation

No. 90-1212

In The

Supreme Court of the United States

October Term, 1990

TAHOE-SIERRA PRESERVATION COUNCIL, INC., et al.,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS TAHOE-SIERRA PRESERVATION COUNCIL, INC., ET AL.

INTEREST OF AMICUS CURIAE

The interests of amicus are set forth in the preceding motion for leave to file brief amicus curiae of Pacific Legal Foundation.

STATEMENT OF THE CASE

This case presents the question of whether the "ripeness" doctrine in the land use context has been stretched beyond its legal and practical limits by the Ninth Circuit's per curiam opinion in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331 (9th Cir. 1990). *See* Petitioners' Appendix A at 1a.

Petitioner Tahoe-Sierra Preservation Council represents over 300 individuals who own single-family lots on the Nevada side of Lake Tahoe, and who wish to build homes. In 1984, the Tahoe Regional Planning Agency (TRPA) adopted the Regional Plan at issue in this case.[1] The petitioners challenged the express provisions of the Regional Plan as "directly and specifically prohibit[ing] any reasonable, practical, viable, beneficial, or feasible use of thousands of legally-created lots or parcels of privately-owned real property in the Lake Tahoe Basin . . . ." Petitioners' Appendix F at 126a.

The Ninth Circuit dismissed as unripe petitioners' second and fifth causes of action for damages resulting from the regulatory taking of private property without just compensation. The court concluded that petitioners "were required to request that TRPA amend the [Regional] Plan before they filed this action, and that their failure to do so renders unripe their taking

---

[1] TRPA was created by the Tahoe Regional Planning Compact between the states of California and Nevada. Pub. L. No. 96-551, 94 Stat. 3233 (1980); Cal. Gov't Code § 66801; Nev. Rev. Stat. § 277.200. *See* Petitioners' Appendix E at 73a.

claims . . . . " *Tahoe-Sierra*, 911 F.2d at 1336. Petitioners' Appendix A at 9a.

The court reasoned that an application for an amendment to the Regional Plan would afford petitioners the opportunity for an "administrative" remedy regarding their plans for development. This "administrative" remedy, the court noted, "offers the same possibility regarding development as does a system for requesting variances." *Id.* The court found no reason to distinguish an application for administrative relief, as required in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), from an application for an amendment to the land use law itself: "Certainly as long as the process is limited and reasonably short in duration, and is guaranteed to culminate in either a 'yes' or a 'no,' we believe the plaintiffs are required to pursue it." *Tahoe-Sierra*, 911 F.2d at 1339. Petitioners' Appendix A at 15a-16a.

SUMMARY OF THE ARGUMENT

The court below has neglected to consider the impact of its new "ripeness" rule on private property owners who, after already expending substantial time and money in an effort to comply with other ripeness requirements, must now leap yet another technical (but costly) hurdle in order to have their day in court. Governmental entities will no doubt adopt new "amendment" procedures for the sole purpose of avoiding and delaying substantive judicial review of land use regulations.

The court also failed to acknowledge the existence of a long line of conflicting court decisions, including decisions by this Court. These decisions hold that the traditional "ripeness" analysis is only relevant to "as-applied" takings claims, as opposed to "facial" claims which contend that the "mere enactment" of the statute or ordinance in and of itself results in a taking. The Ninth Circuit was overly intent on applying the "finality" requirement of *Williamson County* even though that was an "as-applied" case. Here the petitioners are asserting that the Regional Plan on its face caused a taking. As will be shown, the Ninth Circuit's error has resulted in a conflict among the Circuit Courts regarding the applicable ripeness analysis for facial takings claims.

If the decision below is allowed to stand, property owners will have little hope of ever seeing the light at the end of the "ripeness" tunnel. This Court should grant the petition in order to put reasonable limits on the "ripeness" doctrine, and to reaffirm the right of private property owners to obtain judicial review of overburdensome governmental enactments which directly impact the right to make reasonable use of property.

ARGUMENT

I

AS A MATTER OF PUBLIC POLICY, PRIVATE PROPERTY OWNERS SHOULD NOT BE REQUIRED TO APPLY FOR AN AMENDMENT TO THE LAND USE LAW ITSELF BEFORE SEEKING JUDICIAL RELIEF

Within the last decade, the "ripeness" doctrine has become the single most litigated issue in Fifth

Amendment takings cases. A governmental entity which does not assert one of the increasingly long list of available "ripeness" defenses could probably be accused of malpractice.

Lack of precedent notwithstanding, the Ninth Circuit has created yet another technical "ripeness" defense for the benefit of governmental entities: failure of the property owner to seek an amendment to the land use law itself. This new rule, in conjunction with the already burdensome "ripeness" requirements of finality and exhaustion of state compensation procedures, transforms the Fifth Amendment's just compensation mandate into a theoretical pipe dream for private property owners.

There are several reasons why this new "ripeness" requirement will have significant impacts on private property owners—impacts which were not even considered by the Ninth Circuit. First, land use applications can carry hefty price tags. Some cities and counties charge thousands of dollars in fees just for the privilege of asking for an amendment to the land use law.

Second, the cost of developing the information needed to support an application to amend a land use statute or ordinance can be enormous. Most general land use laws in California (called "general plans") consist of hundreds of pages of detailed policy and environmental analysis prepared by professional land use planners and funded by tax dollars. California actually requires all general plans to contain a number of mandatory elements, including the impact of land use designations on housing, conservation, noise, safety, open space, and

transportation.[2] A general plan amendment application, which would now be required by the Ninth Circuit's decision, would likewise have to address these mandatory elements. Private property owners, the majority of whom are middle-class families on fixed budgets, should not be required to hire environmental consultants and experts at astronomical fees in order to "formally" request an amendment to a land use law.

If the property owner's amendment application did not include this type of detailed policy and environmental analysis, what would prevent a governmental entity from refusing to even *consider* the application? If the application were deemed incomplete for this reason, the property owner would *never* be able to seek just compensation for a regulatory taking because the case would never be ripe.

The substantial amount of time it would take to submit a complete amendment application also raises statute of limitations problems. In the present case, the property owners were faced with a 60-day statute of limitations to initiate litigation "arising out of the adoption or amendment of the regional plan" as provided in Art. VI(j)(4) of the California-Nevada Compact. Petitioners' Appendix E at 105a. *See also* Brief of Petitioners at n.17. It would be virtually impossible to gather the necessary information for an amendment application in such a short period of time, especially in California, where it often takes *years* for cities and counties to amend their general plans.

---

[2] *See* Cal. Gov't Code § 65302.

Finally, some local agencies in California have adopted ordinances which require *voter approval* for any amendment to the general plan. Property owners who request such amendments are thus required to personally pay for the cost of special elections. One such ordinance was recently adopted, by initiative, in Monterey, California. Property owners in these cities must now pay for a special election before their Fifth Amendment just compensation claims will be ripe for judicial review.

These practical, commonsense concerns were completely ignored by the Ninth Circuit, which focused solely on the fact that "TRPA specifically invites amendment proposals and promises action on them within a reasonable time." *Tahoe-Sierra*, 911 F.2d at 1337. Petitioners' Appendix A at 10a.[3]

This simplistic, rigid view of the land use legislative process fails to recognize the due process rights of property owners. Perhaps this was due to an inherent belief that the constitutional rights of property owners are of collateral importance. The Ninth Circuit said: "Suffice it to say that even the framers of the fifth amendment saw the wisdom of enumerating life, liberty, and property separately, and that few of us would put equal value on the first and the third." *Tahoe-Sierra*, 911 F.2d at 1338 n.5. Petitioners' Appendix A at 13a. But as observed in Judge Kozinski's dissent, this view reflects a "thinly disguised

---

[3] In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), this Court required courts to "evaluate both the fitness of the issues for judicial decision and the *hardship to the parties* of withholding court consideration" when addressing ripeness issues. *Id.* at 149 (emphasis added).

contempt" for constitutionally protected property rights. In any event, the reasoning of Judge Kozinski's dissent regarding the necessity of a new "ripeness" hurdle, in and of itself, demonstrates great need for review by this Court.

II

THE NINTH CIRCUIT'S NEW "RIPENESS" RULE CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS

Aside from the public policy concerns discussed above, the Ninth Circuit's per curiam opinion conflicts with the well-established precedents of this Court and other Circuit Courts. In a line of cases stretching from *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), to *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), this Court has consistently addressed the merits of "facial" takings challenges without applying the traditional "as-applied" ripeness test.

The *Keystone* Court, quoting *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 294-96 (1981), emphasized the distinction between these two types of claims:

> " 'Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the [Surface Mining Control and Reclamation] Act to particular surface mining operations or its effect on specific parcels of land. Thus, *the only issue properly before . . . this Court, is whether the "mere enactment" of the Surface Mining Act constitutes a taking.* [Quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)]. The

> test to be applied in considering this *facial challenge* is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land . . . . " ' " 480 U.S. at 495 (emphasis added).

As in *Keystone*, petitioners are not challenging the application of specific provisions of the TRPA Regional Plan. Rather, they are claiming that the mere *enactment* of the Regional Plan constitutes a taking because it forbids all economically viable use of land *by its very terms*. This is precisely the type of claim which the *Keystone* Court addressed, on its merits, without reference to the traditional "ripeness" analysis.[4]

If the enactment of a regulation results in a taking, that regulation "necessarily implicates the 'constitutional obligation to pay just compensation.' " *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (citation omitted). The governmental agency, if it chooses, can then amend or repeal the

---

[4] Even if petitioners were pursuing an "as-applied" challenge to the Regional Plan, the Ninth Circuit's opinion would conflict with *Williamson County*, 473 U.S. at 172. In that case, this Court held that an "as applied" takings claim is not ripe "until the government entity charged with implementing the regulations has reached a final decision regarding the *application of the regulations* to the property at issue." *Id.* at 186 (emphasis added).

There is a substantial difference between requesting relief from the application of a regulation, usually by means of a variance, and requesting an amendment to the regulation itself. The former is a request for administrative relief, as required by *Williamson County*, while the latter is a request for legislative relief.

intrusive regulation. *Id.* at 321. This converts the taking to a temporary or lesser one. *Id.* at 317-18. Nevertheless a taking necessarily results and no case suggests that a property owner, to obtain compensation, must first formally ask the governmental agency to amend or repeal the regulation. As *First Church* recognized, the Fifth Amendment "is designed not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id.* at 315 (emphasis in original). The rationale underlying the Ninth Circuit's per curiam opinion—a rationale which requires affected property owners to beseech the governmental agency to amend or repeal its intrusive regulation as a condition to compensation—totally fails to mesh with the concepts so clearly articulated by this Court in *First Church.*

The opinion below also conflicts with the holdings of a number of Circuit Courts, including the Ninth Circuit. These decisions are all discussed in detail in the Petition for Writ of Certiorari. What is especially significant about these decisions is the fact that they *uniformly* recognize the inapplicability of the traditional ripeness analysis to "facial" takings claims.

CONCLUSION

The "ripeness" doctrine should not be fashioned into an instrument for the dilatory aims of governmental entities. Nor should private property owners be subjected to a Kafkaesque maze of technical, expensive, and ultimately futile procedures in order to secure judicial review

of overburdensome governmental regulations. Contrary to the opinion of the court below, "a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance Corporation*, 405 U.S. 538, 552 (1972).

In the interest of uniformity of law and the preservation of basic property rights, it is respectfully submitted that the petition for writ of certiorari be granted.

DATED: February, 1991.

Respectfully submitted,

RONALD A ZUMBRUN
*EDWARD J. CONNOR, JR.
TIMOTHY V. KASSOUNI
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae,
Pacific Legal Foundation